No. 01-518-CFX Title: BE&K Construction Company, Petitioner
v.
National Labor Relations Board, et al.

Docketed: September 26, 2001 Court: United States Court of Appeals for the Sixth Circuit

Entry	Date	Proceedings and Orders
	Sep 25 2001	Petition for writ of certiorari filed. (Response due December 5, 2001)
	Oct 18 2001	Order extending time to file response to petition until November 26, 2001.
	Oct 18 2001	This extension is granted for all respondents.
	Nov 19 2001	Order further extending time to file response to petition until December 5, 2001.
	Nov 19 2001	This extension is granted for all respondents.
	Dec 5 2001	Brief of respondent National Labor Relations Board in opposition filed.
	Dec 5 2001	Brief of Intervenor-Respondents in opposition filed.
	Dec 5 2001	Brief amici curiae of Chamber of Commerce of the United States, et al. filed.
	Dec 18 2001	Reply brief of petitioner BE&K Construction Co. filed.
	Dec 19 2001	DISTRIBUTED for Conference of January 4, 2002
	Jan 4 2002	Petition GRANTED. limited to the following question: "Did the Court of Appeals err in holding that under Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983), the NLRB may impose liability on an employer for filing a losing retaliatory lawsuit, even if the employer could show the suit was not objectively baseless under Professional Real Estate Inventors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49 (1993)?" SET FOR ARGUMENT April 16, 2002. **********
	Feb 19 2002	Brief of petitioner BE&K Construction Co. filed.
	Feb 19 2002	Joint appendix filed.
	Feb 19 2002	Brief amicus curiae of Society for Human Resource Management and LPA, Inc. filed.
	Feb 19 2002	Brief amici curiae of Chamber of Commerce of the United States, et al. filed.
	Feb 28 2002	Record filed.
	Mar 1 2002	CIRCULATED.
	Mar 21 2002	Brief of respondent National Labor Relations Board filed.
	Mar 21 2002	Brief of respondents International Brotherhood of Electrical Workers,#302, et al. filed.
	Apr 4 2002	Reply brief of petitioner BE&K Construction Co. filed.
	Apr 8 2002	Letter from Deputy Solicitor General received and distributed.
	Apr 16 2002	ARGUED.
	Apr 18 2002	LODGING consisting of twenty five copies of a letter and NLRB Annual Report for 1999, submitted by the Solicitor General and distributed.
	Jun 24 2002	Adjudged to be REVERSED and REMANDED O'Connor, J., delivered the opinion of the Court, in which Rehnquist,

2pp

No. 01-518-CFX

Entry	Date	Proceedings and Orders
		C.J., and Scalia, Kennedy, and Thomas, JJ., joined. Scalia, J., filed a concurring opinion, in which Thomas, J., joined. Breyer, J, filed an opinion concurring in part and concurring in the judgment, in which Stevens, Souter, and Ginsburg, JJ., joined.

(1)
01 51 [illegible] 2001
OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

BE&K CONSTRUCTION CO.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For Writ of Certiorari To The
United States Court of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Maurice Baskin
Counsel of Record for
Petitioner
Venable, LLP
1201 New York Ave., N.W.,
Suite 1000
Washington, D.C. 20005
202-962-4800

9700

QUESTIONS PRESENTED FOR REVIEW

1. Whether the National Labor Relations Board and the court of appeals erred in eliminating First Amendment protection for lawsuits which are not objectively baseless, when other courts of appeals have found that the NLRB standard departs from the test set forth by this Court in *Professional Real Estate Investors v. Columbia Pictures Industries,* 508 U.S. 49 (1993).

2. Whether the NLRB and the court of appeals erred in ruling that an employer violates Sections 7 and 8(a)(1) of the National Labor Relations Act by bringing a good faith but ultimately non-prevailing lawsuit against a non-employee labor organization, contrary to the explicit language of this Court in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), and *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), and contrary to the holdings of other courts of appeals.

3. Whether the court of appeals erred in upholding the NLRB's finding of the required element of "retaliatory motivation," under a rationale not articulated by the Board itself, in conflict with *NLRB v. Yeshiva University,* 444 U.S. 672, 685, n.22 (1980*),* and in further conflict with the holding of *Bill Johnson's Restaurants v. NLRB, supra,* and numerous appellate court decisions.

4. Whether the National Labor Relations Board and the court of appeals erred in awarding attorneys fees to a labor organization, where the Ninth Circuit had expressly rejected any award of attorneys fees in the same lawsuit, *USS-POSCO Ind. v. Contra Costa Cty. Bldg. and Const. Trades Council,* 31 F. 3d 810 (9th Cir. 1994), and where the award of attorneys fees under Section 8(b)(4) of the NLRA conflicts directly with this Court's holding in *Summit Valley Industries, Inc. v. United Brotherhood of Carpenters & Joiners*, 456 U.S. 717 (1982).

LIST OF PARTIES TO PROCEEDINGS IN THE COURT OF APPEALS AND CORPORATE DISCLOSURE STATEMENT

The Petitioner in this case is BE&K Construction Corp. ("BE&K"), a Delaware corporation. Petitioner is not related to any other publicly held or publicly traded companies under Supreme Court Rule 29.6.

Respondent in this case is the National Labor Relations Board ("NLRB").

Intervenors in this action before the court of appeals were the Steamfitters Local 342, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO and Local 302, International Brotherhood of Electrical Workers, AFL-CIO and District Council of Iron Workers of the State of California and Vicinity, International Union of Bridge, Structural and Ornamental Iron Workers, AFL-CIO and Contra Costa County Building And Construction Trades Council, AFL-CIO and Northern California District Council Of Laborers, Laborers International Union Of North America, AFL-CIO and Bay Counties District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO and Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL-CIO and Local Union No. 378, International Union of Bridge, Structural and Ornamental Iron Workers, AFL-CIO and Cement Masons Union Local No. 825, Operative Plasterers and Cement Masons International Association, AFL-CIO and Local No. 549, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES AND CORPORATE DISCLOSURE .. iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS . 2

STATEMENT OF THE CASE 2

REASONS FOR ALLOWING THE WRIT 5

I. This Court's Intervention Is Required To Correct A Double Standard By Which Lawsuits Are Being Afforded Far Less First Amendment Protection Under The NLRA Than Is Uniformly Applied Under Other Statutes. 5

II. The Decisions Below Have Improperly Extended Protections of the NLRA To Non-Employee Labor Organizations, In Defiance Of This Court's Holding In *Lechmere Stores v. NLRB.* 14

III. The Writ Should Be Granted In Order To Resolve A Conflict Within The Circuits Regarding The Findings Necessary To Establish "Retaliatory Motivation" Under *Bill Johnson's* 17

IV. The Writ Should Be Granted In Order To Resolve The Direct Conflict Between The Sixth And Ninth Circuits Regarding The Award Of Attorneys Fees As A Remedy In This Case 16

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

BE&K Construction Co. v. NLRB, 246 F. 3d 619 (6th Cir. 2001) ..... passim

BE&K Construction Co., 329 NLRB No. 68 (Sept. 30, 1999) ..... passim

Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983) ..... passim

Braum Elec. Co., Inc., 324 NLRB 1 (1997) 8

California Motor Transport Co., Inc. v. Trucking Unlimited, 404 U.S. 508 (1972)..... 6,7

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 8

Diamond Walnut Growers, Inc. v. NLRB, 53 F. 3d 1085 (9th Cir. 1995)..... 9,13

Eastern R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 6

Eastex, Inc. v. NLRB, 437 U.S. 556 (1978) 13

Johnson & Hardin Co. v. NLRB, 49 F. 3d 237 (6th Cir. 1996) 12,15,18

J.P.Stevens, 268 NLRB 8 (1963).....17

Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992) ..... i, 5, 14

McDonald v. Smith, 472 U.S. 479 (1985)..... 6

NLRB v. Alan Motor Lines, Inc.,937 F. 2d 887 (3d Cir. 1991) 15

NLRB v. Columbia University, 541 F. 2d 922 (2d Cir. 1976) 15

NLRB v. Donna-Lee Sportswear Co., Inc., 836 F. 2d 31 (1st Cir. 1987) 17

NLRB v. Heyman, 541 F. 2d 796 (9th Cir. 1976).....17

NLRB v. Local 520, IUOE, 15 F.3d 677 (7th Cir. 1994) 14,16

NLRB v. Vanguard Tours, Inc., 981 F. 2d 62 (2d Cir. 1992) 10,14

NLRB v. Yeshiva University, 444 U.S. 672 (1980) ..... i, 4, 15

Petrochem Insulation, Inc., 330 NLRB No. 10 (1999)..... 9

Petrochem Insulation, Inc. v. NLRB, 240 F. 3d 26 (D.C. Cir. 2001) 10, 14

Professional Real Estate Investors v. Columbia Pictures Industries, 508 U.S. 49 (1993)..... i,4,5,7,9

Speedrack Products Group, LTD. v. NLRB, 114 F. 3d 1276 (D.C. Cir. 1997) 15

Summit Valley Industries, Inc. v. United Brotherhood of Carpenters & Joiners, 456 U.S. 717 (1982)..... ii,5,17

United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967)..... 6

United Mine Workers v. Pennington, 381 U.S. 657 (1965)...6

USS-POSCO Ind. v. Contra Costa Cty. Bldg. and Const. Trades Council, 31 F. 3d 810 (9th Cir. 1994)..... passim

White v. Lee, 227 F. 3d 1214 (9th Cir. 2000)..... 8,9,10,12

STATUTES

28 U.S.C. § 1254.....2

29 U.S.C. §152.....12

29 U.S.C. § 157 2,12

29 U.S.C. § 158(a)(1) 2,6,12,14

29 U.S.C. § 158(b)(4) 2,3

29 U.S.C. § 160(c) 2

29 U.S.C. § 187.....2,3,17

No.

IN THE
SUPREME COURT OF THE UNITED STATES

BE&K CONSTRUCTION CO.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For Writ of Certiorari To The
United States Court of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The ruling of the United States Court of Appeals for the Sixth Circuit as to which the writ is being sought is reported as *BE&K Construction Co. v. NLRB*, 246 F. 3d 619 (6th Cir. 2001), rehearing en banc den. (June 28, 2001) (App. 1a). That decision enforced an Order of the National Labor Relations Board reported as *BE&K Construction Co.*, 329 NLRB No. 68 (Sept. 30, 1999)(App.28a). A related decision of the Court of Appeals for the Ninth Circuit is reported as *USS-POSCO Indus. v. Contra Costa County Bldg. & Const. Trades Council, AFL-CIO*, 31 F. 3d 800 (9th Cir. 1994).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. Rehearing en banc was denied by the court of appeals on June 28, 2001 (App. 26a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

United States Constitution, First Amendment

29 U.S.C. § 157

29 U.S.C. § 158(a)(1)

29 U.S.C. § 158(b)(4)

29 U.S.C. § 160 (c)

29 U.S.C. §187.

STATEMENT OF THE CASE

This Petition arises from the Sixth Circuit's denial of Petitioner's appeal from an Order of the NLRB. The NLRB held that Petitioner BE&K violated Section 8(a)(1) of the NLRA by filing and maintaining a civil lawsuit seeking to halt misconduct threatening BE&K's business which had been engaged in by a group of non-employee unions. BE&K, a construction contractor, and its client USS-POSCO Industries ("UPI") brought suit in federal court in response to a series of unsupported regulatory challenges, frivolous lawsuits, violence and other union tactics aimed at driving non-union BE&K off of a large UPI construction project in Contra Costa County, California. *USS-POSCO Ind. and BE&K Construction Co. v. Contra Costa County Bldg. &*

Constr. Trades Council, AFL-CIO, et al., No. C-87-4829 DLJ (the "*USS-POSCO*" action).

BE&K did not sue any employees, but only sued non-employee labor organizations. Further, none of the unions sued by BE&K represented any of BE&K's employees or claimed to be acting on behalf of BE&K's employees. BE&K's complaint under Section 303 of the Labor Management Relations Act, 29 U.S.C. § 187, alleged that the unions' actions violated Section 8(b)(4) of the Labor Management Relations Act, 29 U.S.C. 158(b)(4). BE&K later amended its complaint to allege that the unions violated the Sherman Act, 15 U.S.C. 1.

The district court limited BE&K's discovery and, applying a standard later found to be improper by the court of appeals, dismissed or granted summary judgment against BE&K's claims. BE&K appealed to the U.S. Court of Appeals for the Ninth Circuit.

The Ninth Circuit reversed the district court's legal analysis but upheld the judgment against BE&K on the slimmest of margins – the fact that a slight majority (15 of 29) of the unions' actions against BE&K had proven successful in some measure. See *USS-POSCO*, 31 F.3d at 810. But for that fact, according to the Court of Appeals opinion, much of the union activity alleged in BE&K's complaints would not have been protected from the antitrust laws. *Id.*

The district court had ordered BE&K to pay the unions' attorneys fees as a sanction for maintaining the suit. The Ninth Circuit expressly reversed this order, instead finding that the Petitioner had acted in good faith and that the unions were not entitled to any award of attorneys fees against BE&K. *USS-POSCO Ind. v. Contra Costa Cty. Bldg. And Const. Trades Council*, 31 F. 3d 810 (9th Cir. 1994).

Subsequently, the NLRB's General Counsel asserted that BE&K's suit against the unions violated Section 8(a)(1) of the Act. Acting without a hearing on a motion for summary judgment, the Board agreed. On September 30, 1999, the NLRB found that BE&K's suit "lacked merit" (solely in the sense that BE&K did not "prevail") and was brought in retaliation for the unions having engaged in activities protected by Section 7 of the Act. The NLRB accordingly ordered BE&K, *inter alia*, to reimburse the unions for all legal and other expenses incurred in defending against the *USS-POSCO* litigation. (App. 28a).

On April 9, 2001, the U.S. Court of Appeals for the Sixth Circuit affirmed the Board's decision. The court held that dicta in this Court's decision in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), justified application of a different First Amendment standard for protecting the right of access to the courts under the National Labor Relations Act, than the standard set forth by the Court more recently in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993).

The Sixth Circuit further found that the right of unions to claim reimbursement and protection under Sections 7 and 8(a)(1) of the Act is indistinguishable from the rights of employees under these provisions, notwithstanding this Court's decision to the contrary in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

The court of appeals further upheld the NLRB's finding that BE&K filed its suit with "retaliatory motive." However, the court did so on a basis not articulated by the agency itself, in violation of the holdings of *NLRB v. Yeshiva University*, 444 U.S. 672, 685, n.22 (1980), *Bill Johnson's Restaurants v. NLRB, supra*, and numerous other conflicting decisions.

Finally, the court found that the remedy of awarding attorneys fees to the unions was appropriate, despite the Ninth Circuit's prior rejection of just such an award in the same litigation. *USS-POSCO, supra*, 31 F. 3d at 811-812. Included in the court's award (and the NLRB's) are fees spent in connection with litigation under Section 8(b)(4) of the Act, which this Court expressly held should not be awarded to prevailing parties under that statute in *Summit Valley Industries, Inc. v. United Brotherhood of Carpenters & Joiners*, 456 U.S. 717 (1982).

REASONS FOR ALLOWING THE WRIT

I. This Court's Intervention Is Required To Correct A Double Standard By Which Lawsuits Are Being Afforded Far Less First Amendment Protection Under The NLRA Than Is Uniformly Applied Under Other Statutes.

This case is the culmination of a series of NLRB and court decisions which have created a dangerous anomaly in the law threatening the entire business community's right of access to the courts on labor issues. By upholding the NLRB's award of attorneys fees to the unions against BE&K, the Sixth Circuit has grossly distorted the holding of *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983). As a result, the court of appeals has undercut vital First Amendment protections which this Court found to be paramount in *Professional Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49 (1993).

The Court has described the right to petition as "among the most precious of the liberties safeguarded by the Bill of Rights" and "intimately connected, both in origin and in purpose, with the other First Amendment rights of free speech and free press." *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967). "[E]xcept in the most

extreme circumstances citizens cannot be punished for exercising this right 'without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions...'" *McDonald v. Smith*, 472 U.S. 479, 486 (1985)(Brennan, J., concurring).

In *California Motor Transport Co., Inc. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), the Court extended the *Noerr-Pennington* doctrine[1] to protect the right of citizens to bring actions before administrative agencies and in the courts. The Court held that such actions were immunized by the First Amendment from statutory liability, unless they were mere "shams," i.e., objectively baseless.

In *Bill Johnson's Restaurants v. NLRB, supra*, the Court made clear that the same First Amendment principles applied to litigation challenged under the National Labor Relations Act. Expressly citing *California Motor Transport*, the Court held that "the Board may not halt the prosecution of a state-court lawsuit, regardless of the plaintiff's motive, unless the suit lacks a reasonable basis in fact or law." 461 U.S. at 748.

In *dicta*, the *Bill Johnson's* Court briefly opined that "[i]f judgment goes against the employer in the ... court, however, or if his suit is withdrawn or is otherwise shown to be without merit, the employer has had its day in court, the interest of the State in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the § 8(a)(1) and § 8(a)(4) unfair labor practice case.... Id. at 747. However, the Court nowhere addressed in *Bill Johnson's* the First Amendment standard which should apply to such post-judgment unfair labor practice cases.

---

[1] *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965),

Subsequently, in *Professional Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49 (1993), the Court clarified the standard for protecting litigants' rights under the First Amendment, as follows:

> Since *California Motor Transport*, we have consistently assumed that the sham exception contains an indispensable objective component .... Whether applying *Noerr* as an antitrust doctrine *or invoking it in other contexts*, we have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham .... Indeed, by analogy to *Noerr*'s sham exception, we held that even an "improperly motivated" lawsuit may not be enjoined under the National Labor Relations Act as an unfair labor practice unless such litigation is "baseless."

Id. at 58-59, citing *Bill Johnson's Restaurants* (emphasis added).

Since *Professional Real Estate Investors*, it should thus be clear that "whether applying *Noerr* as an antitrust doctrine or invoking it in other contexts," a lawsuit is protected by the First Amendment from statutory liability unless it is "objectively baseless." As the Court further explained, "objectively baseless" and "nonmeritorious" are synonymous terms which both mean that "no reasonable litigant could realistically expect success on the merits" at the time a suit is filed. The Court expressly held that "when the ... defendant has lost the underlying litigation, a court must 'resist the understandable temptation to engage in post hoc reasoning by concluding' that an ultimately unsuccessful 'action must have been unreasonable or without foundation.'...The court must remember that 'even when the

law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.'" *Id.* at 61, n.5, quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-422 (1978).

Notwithstanding the clearly expressed intention of the Court to establish a uniform First Amendment standard immunizing lawsuits from *all* forms of statutory liability, the NLRB and several courts of appeals have misapplied the *Bill Johnson's* dicta to carve out a wholly unwarranted exception from *Professional Real Estate Investors*. *See BE&K Construction Co.*, 329 NLRB No. 68 (1999) (App. 43a); *see also Petrochem Insulation, Inc.*, 330 NLRB No. 10, *10-11 (1999); *Braum Elec. Co., Inc.*, 324 NLRB 1 (1997). The Sixth Circuit committed the same error, declaring erroneously that *Professional Real Estate Investors* "involved only a claim of *Noerr-Pennington* immunity from *antitrust* liability." (App. 19a)(emphasis in original). According to the court of appeals, *Bill Johnson's* creates a "bifurcated system of analysis in determining the protections to be afforded an employer for filing retaliatory lawsuits against employees and unions." "Following a court determination … there is no longer a need to prevent interference with the First Amendment right to seek judicial redress." *Id.*

Unlike the Sixth Circuit, two other courts of appeals have raised serious questions about the double standard created by the NLRB's interpretation of the *Bill Johnson's dicta*, in light of the subsequent holding in *Professional Real Estate Investors*. Both courts ultimately upheld the NLRB's position, but both called upon this Court to clarify this critically important anomaly in the law.

In *White v. Lee*, 227 F. 3d 1214 (9th Cir. 2000), a case decided under the Fair Housing Act, the court was nevertheless called upon to address the apparent conflict created by the two Supreme Court decisions. The court declared that, but for a prior holding by another circuit panel

in *Diamond Walnut Growers, Inc. v. NLRB*, 53 F. 3d 1085, 1088 (9th Cir. 1995), the court would "ordinarily be tempted to treat these statements in *Bill Johnson's* as *dicta*, because they were not pertinent to the case before the Court and because in *Professional Real Estate Investors*, decided ten years later, the Court did not even mention the *Bill Johnson's* statements when holding that unsuccessful lawsuits receive the traditional protection described in *California Motor Transport*, specifically including the requirement of objective baselessness." *See White v. Lee, supra*, 227 F. 3d at 1235-36.

The *White* court reemphasized this point in its footnote 18, as follows:

> Particularly notable is the fact that in *Professional Real Estate Investors,* the Court cited the holding in *Bill Johnson's* that "by analogy to *Noerr's* sham exception, . . . even an 'improperly motivated' lawsuit may not be enjoined under the National Labor Relations Act as an unfair labor practice unless such litigation is 'baseless.'" 508 U.S. at 59. However, rather than applying or even citing the subsequent *Bill Johnson's* statements regarding unsuccessful lawsuits, the Court emphasized that a litigant's failure to prevail did *not* establish the objective baselessness of his suit, and it proceeded to apply *Noerr-Pennington* immunity to an action that had in fact been defeated on summary judgment. Had the Court believed that the statements in *Bill Johnson's* had any effect, we would expect that it would have explained why it did not apply them in the case before it. The fact that the Court did not do so indicates that it considered the statements dicta.

White v. Lee, supra, 227 F. 3d at 1235, n.18.

More recently, while upholding another NLRB decision relying on *Bill Johnson's* in the face of *Professional Real Estate Investors*, the Court of Appeals for the D.C. Circuit expressed significant reservations over the substantial limits on First Amendment protections caused by the Board's view of the law. The D.C. Circuit strongly suggested that this Court should take up and clarify the differing standards.

> We understand that [the NLRB's interpretation]sets the bar for sham litigation – litigation not protected by the First Amendment – lower than in *Noerr Pennington* cases; on proof of retaliation, employer suits that are better than baseless under *Noerr-Pennington* (ones for which "there is any realistic chance that the plaintiff's legal theory might be adopted" id at 747) may evidently be classified as sham litigation after the employer-plaintiff loses. Perhaps the Supreme Court will one day create a uniform standard for sham litigation governing both the NLRA and non-NLRA cases (or explain why the First Amendment protects erring litigants less in the NLRA context than others), but until that day, the language in *Bill Johnson's* must control.

Petrochem Insulation, Inc. v. NLRB, 240 F. 3d at 32.

The Sixth Circuit decision also conflicts directly with the Second Circuit opinion in *NLRB v. Vanguard Tours, Inc.*, 981 F. 2d 62 (2d Cir. 1992). There the Second Circuit declined to accept the Board's method of determining lack of "merit" in the case of a withdrawn lawsuit (for which the test

of merit under *Bill Johnson's* is listed in the same category as a judicially determined judgment). The *Vanguard* court held:

> Because the Board did not find that Vanguard's suit lacked a reasonable basis in fact or law, either at the outset or at the point when the employer briefly permitted it to remain pending, the Board's determination that the lawsuit was an unfair labor practice may not be sustained.

Id. at 66.

In the present case, it was undisputed before the NLRB that, at the time BE&K filed its lawsuit, the Company had a reasonable belief that it would prevail. Numerous antitrust experts advised the Petitioner to pursue its antitrust claims, and the NLRB's own General Counsel found nearly identical facts to state a claim under Section 8(b)(4). A law review article used BE&K's experience as a case study of anticompetitive union activities. Durie & Lemley, 80 Cal. L. Rev. at 759-62. Finally, the Ninth Circuit itself declared the unions' activities against BE&K to be "troublesome," finding that "we cannot say that pursuing legitimate labor goals through this kind of activity [pressing frivolous lawsuits, automatically protesting against permits sought by BE&K, etc] is per se exempted from the antitrust laws." *USS-POSCO, supra*, 31 F. 3d at 809.

Under these circumstances, the failure of the Sixth Circuit to apply First Amendment protection to BE&K's litigation demonstrates the fallacy of the NLRB's interpretation of the *Bill Johnson's* dicta. The court of appeals decision fundamentally chills the right of employers everywhere to petition the courts in defense of their businesses.

Only this Court can correct the anomaly which now exists as a result of the NLRB's undermining of the

Professional Real Estate Investors standard. The writ should be granted so that uniformity of the law can be reestablished by the Court.

II. The Decisions Below Have Improperly Extended Protections of the NLRA To Non-Employee Labor Organizations, In Defiance Of This Court's Holding In *Lechmere Stores v. NLRB*.

Section 8(a)(1) of the NLRA states that it shall be an unfair labor practice for an employer "to interfere with, restrain, or coerce ***employees*** in the exercise of the rights guaranteed in section 157 of this title." (emphasis added). The rights guaranteed by Section 7 (29 U.S.C. § 157) are likewise addressed only to "employees," as this Court squarely held in *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992).

It is undisputed that BE&K here took no adverse action of any kind against "employees." All that BE&K did was pursue a lawsuit against a group of labor organizations.[2] By the plain terms of Section 8(a)(1), BE&K's litigation should never have been found to have violated the Act.

Certainly, nothing in *Bill Johnson's* supports the result achieved by the NLRB and the Sixth Circuit. The Supreme Court's holding was fully consistent with the terms of Section 8(a)(1), finding only that an employer can commit an unfair labor practice when it improperly sues "employees." 461 U.S. 731, 740, 744.

The court of appeals' holding conflicts directly with another decision of the Sixth Circuit, *Johnson & Hardin Co. v. NLRB*, 49 F. 3d 237 (6th Cir. 1996). There the court

[2] It is worth reiterating that "labor organizations" are, by definition under the NLRA, decidedly ***not*** "employees." Compare 29 U.S.C. § 152(3)(definition of "employee") with 29 U.S.C. § 152(5)(definition of "labor organization").

followed the plain holding of *Lechmere* and stated that "Section 7 does not protect non-employee union organizers" (49 F. 3d at 240). The court of appeals further held:

> Here, the Board erred in finding that there "is no basis for distinguishing between employees and non-employee union representatives as recipients of reimbursement." *Bill Johnson's Restaurants* did not so hold and the Board has failed to support this finding.

Id. at 244. The Board committed the same error in the present case and deliberately ignored this Court's *Lechmere* holding in doing so. This time, however, the Sixth Circuit compounded the NLRB's error by enforcing the Board's decision.

The Sixth Circuit's decision also creates a conflict with the Ninth Circuit's decision in *Diamond Walnut Growers, Inc. v. NLRB*, 53 F. 3d 1085, 1087, 1089 (9th Cir. 1995). There, the court of appeals recognized the limited scope of Section 8(a)(1) under *Bill Johnson's,* in a case involving a suit against a union representing striking employees of the employer. The Ninth Circuit, unlike the Sixth Circuit, recognized that "not all suits against unions interfere with the employees' exercise of their Section 7 rights." The Ninth Circuit found against the employer only because Diamond "interfered with its employees' exercise of their Section 7 rights." Id. As the Court held, Diamond's lawsuit was actionable under the NLRA only because it "had an inevitable impact on the employees who were exercising their Section 7 right to strike." Id.

In deciding to expand the reach of *Bill Johnson's* and Section 8(a)(1) to suits against non-employee labor organizations, both the NLRB and the Sixth Circuit relied heavily, and erroneously, on this Court's holding in *Eastex, Inc. v. NLRB,* 437 U.S. 556, 564-5 (1978). In *Eastex,*

however, the Court held only that the term "employee" is not limited to the employees of a particular employer. (NLRB Br. at 22). Nothing in the *Eastex* holding extends the definition of "employee" to include labor organizations. Nor was the employer in *Eastex* found to have violated the rights of any employees but his own. All that the Supreme Court held in *Eastex* was that employees of an employer remained protected when they advocated the rights of other employees.

Again, the present case does not involve any adverse action taken by BE&K against ***any*** employees, either its own or anyone else's. BE&K sued a group of unions, not employees. Under such circumstances, no violation of Section 8(a)(1) should have been found. Certiorari should be granted to resolve a clear conflict caused by the Board's and court of appeals' drastic expansion of the scope of the NLRA.

III. The Writ Should Be Granted In Order To Resolve A Conflict Within The Circuits Regarding The Findings Necessary To Establish "Retaliatory Motivation" Under *Bill Johnson's*.

Under the second step analysis called for by the Supreme Court in *Bill Johnson's*, the NLRB was required to consider the reasonableness of BE&K's litigation in determining whether BE&K's motivation was "retaliatory." 461 U.S. at 749. The Sixth Circuit upheld the Board's finding of retaliatory motivation, without any hearing regarding the disputed question of intent, under an analysis directly conflicting with the Supreme Court's holding and decisions of numerous other circuits. *See Petrochem Insulation, Inc. v. NLRB*, 240 F. 3d 26 (D.C. Cir. 2001) (finding retaliation only because employer's complaint was "utterly frivolous"); *NLRB v. Local 520, IUOE*, 15 F.3d 677, 680 (7th Cir. 1994) (no retaliation found, despite lack of success in court); *NLRB v. Vanguard Tours, Inc.*, 981 F. 2d 62, 65 (2d Cir. 1992)

(withdrawn claims not retaliatory where reasonably based). For this reason as well, certiorari should be granted.

The Sixth Circuit compounded its error in the present case by relying on a *post hoc* rationalization for the Board's decision, not the Board's actual, stated rationale. The Board itself declared that it was entitled to find retaliation whenever a lawsuit "targets protected conduct" and seeks damages, and the suit has been found to "lack merit" (only in the sense of having not "prevailed"). (Id.). This standard for proving retaliatory motivation is guaranteed to result in an unfair labor practice finding by the Board, in any case where the employer has lost a lawsuit against a union who is deemed by the Board to have engaged in "protected" activity.

Recognizing the flaw in the NLRB's reasoning, the court of appeals attempted to bolster the Board's opinion by asserting as an *entirely new ground* for retaliatory motive the fact that BE&K filed its antitrust claim as an amendment to its original complaint, seeking treble damages. (App. 19a). The NLRB Decision never claimed that either the filing of the amendment, nor the seeking of treble damages, constituted grounds for a finding of retaliatory motive.

It is well settled that NLRB decisions must be reviewed on the facts and assertions set forth in the Board's opinion and not based upon *post hoc* rationalizations. *NLRB v. Yeshiva University*, 444 U.S. 672, 685, n.22 (1980). The courts of appeals have uniformly adhered to this requirement, until now. *See Speedrack Products Group, LTD. v. NLRB*, 114 F. 3d 1276, 1282 (D.C. Cir. 1997)("It is a basic principle of administrative law that a court can only affirm an agency on the basis of the same rationale relied on by the agency."); *accord, NLRB v. Alan Motor Lines, Inc.*,937 F. 2d 887, 892 (3d Cir. 1991); *NLRB v. Columbia University*, 541 F. 2d 922, 930 (2d Cir. 1976).

In addition, the new, *post hoc* theory on which the court of appeals rested its finding of retaliatory motive, i.e., the fact that BE&K requested treble damages under the antitrust laws, is directly contrary to the plain language of the Clayton Act, 15 U.S.C. 1. That law declares that a finding of treble damages is mandatory for violations of its provisions. The court's unsupported assertion that antitrust treble damages are analogous to punitive damages, which are discretionary and not mandated by statute, was clearly erroneous and conflicts directly with the holding of the Seventh Circuit in *NLRB v. International Union of Oper. Eng., Local 520*, 15 F. 3d 677, 679 (7th Cir. 1994). In *Local 502*, the Seventh Circuit held that it was improper to find retaliatory motive by reference to a request for punitive damages where such damages "are regularly asked for and awarded" under the state law on which a tort suit has been based.

The Sixth Circuit's reliance on BE&K's request for treble damages, which "are regularly asked for and awarded under the antitrust laws" creates another direct conflict in the law which must be resolved by this Court. The appeals court's unsupported theory, never adopted by the NLRB, cannot form the basis for the finding of retaliatory intent required by *Bill Johnson's*. This aspect of the Sixth Circuit's decision therefore further supports granting the writ of certiorari.

IV. The Writ Should Be Granted In Order To Resolve The Direct Conflict Between The Sixth And Ninth Circuits Regarding The Award Of Attorneys Fees As A Remedy In This Case.

As noted above, the Ninth Circuit expressly rejected a demand by the unions for attorneys fees at the conclusion of the USS-POSCO litigation. *See USS-POSCO*, supra, 31 F. 3d at 812. The Ninth Circuit's decision should have been given

res judicata effect by the NLRB and the Sixth Circuit.[3] However, both the NLRB and the Sixth Circuit ignored the Ninth Circuit's holding in themselves awarding attorneys fees in connection with the same lawsuit. (App. 22a, 62a). A direct conflict between the circuits therefore exists which must be resolved by this Court on certiorari.

The Sixth Circuit likewise ignored this Court's explicit holding in *Summit Valley Industries, Inc. v. United Brotherhood of Carpenters & Joiners*, 456 U.S. 717 (1982), that attorneys fees should not be awarded to a prevailing party in litigation under Section 303 of the LMRA. As the Court explained: "[O]ne of the primary justifications for the American Rule is that one should not be penalized for merely defending or prosecuting a lawsuit....Even assuming that attorney's fees are necessary to achieve full compensation, this justification alone is not sufficient to create an exception to the American Rule in the absence of express Congressional authority...."

BE&K's complaint was originally filed under Section 303 and was clearly entitled to the protection afforded by the *Summit Valley* decision. *See also J.P. Stevens*, 268 NLRB 8 (1983)(supplemental decision on remand after *Summit Valley* was decided). In the *J.P. Stevens* case, the NLRB had initially awarded attorneys fees in connection with "flagrant employer misconduct" connected with prior litigation. After the *Summit Valley* decision, the *J.P. Stevens* case was remanded by the Fourth Circuit to the Board, which removed all attorneys fee requirements from the new remedial order.

The Sixth Circuit's failure to adhere to the mandate of *Summit Valley* will have a chilling effect on all employer

---

[3] *See NLRB v. Donna-Lee Sportswear Co., Inc.*, 836 F. 2d 31, 33-34 (1st Cir. 1987); *NLRB v. Heyman*, 541 F. 2d 796 (9th Cir. 1976) (applying principles of res judicata to Board Orders).

efforts to enforce Sections 8(b)(4) and 303 of the Act, absent intervention by this Court through the granting of the writ.

Finally, the Sixth Circuit's award of attorneys fees to the unions in this case conflicts directly with the decision of the court in *Johnson & Hardin v. NLRB, supra*, 49 F. 3d at 245. In *Johnson & Hardin*, the court of appeals expressly rejected the "harsh remedy of attorneys fees" under Bill Johnson's, except where the employer's litigation has been found to be frivolous. The NLRB and the Sixth Circuit in the present case squarely disavowed the *Johnson & Hardin* approach, creating a direct conflict. The writ of certiorari should be granted so that this Court can resolve the question.

CONCLUSION

The decision of the Sixth Circuit presents direct conflicts with decisions of this Court and with numerous other appeals court decisions on issues of great importance to the business community. For each of the reasons stated above, the Court should grant the writ of certiorari.

Respectfully submitted,

Maurice Baskin
Venable, LLP
1201 New York Ave., N.W.,
Suite 1000
Washington, D.C. 20005
202-962-4800

Attorney for Petitioner BE&K

APPENDIX

1. BE&K Construction Co. v. NLRB,
246 F. 3d 619 (6th Cir. 2001).....1a

2. BE&K Construction Co. v. NLRB, No. 99-6469,
00-5012 (6thCir.), decision on rehearing en
banc.....26a

3. BE&K Construction Co.,
329 NLRB No. 68 (Sept. 30, 1999) 28a

4. Relevant Constitutional Provisions and Statutes
.....69a

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BE&K CONSTRUCTION COMPANY,

Petitioner/ Cross-Respondent, Nos.99-6469; 00-5012

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/ Cross-Petitioner,

STEAMFITTERS LOCAL 342, et al.,
Intervenors.

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.
Nos. 32-CA-9474; 32-CA-9475; 32-CA-12531-1-8.

Argued: February 1, 2001

Decided and Filed: April 9, 2001

Before: DAUGHTREY and GILMAN, Circuit Judges; COLLIER, District Judge.

COUNSEL

ARGUED: Maurice Baskin, VENABLE, BAETJER, HOWARD & CIVILETTI, Washington, D.C., for Petitioner. Robert J. Englehart, NATIONAL LABOR RELATIONS BOARD, APPELLATE COURT BRANCH, Washington, D.C., for Respondent. Peter D. Nussbaum, ALTSHULER, BERZON, NUSSBAUM, RUBIN & DEMAIN, San Francisco, California, Sandra R. Benson, VAN BOURG, WEINBERG, ROGER & ROSENFELD, Oakland, California, for Intervenor. **ON BRIEF:** Maurice Baskin, VENABLE, BAETJER, HOWARD & CIVILETTI, Washington, D.C., for Petitioner. Aileen A. Armstrong, Anne Marie Lofaso, NATIONAL LABOR RELATIONS BOARD, APPELLATE COURT BRANCH, Washington, D.C., David Habenstreit, NATIONAL LABOR RELATIONS BOARD, OFFICE OF THE GENERAL COUNSEL, Washington, D.C., for Respondent. Peter D. Nussbaum, Meera Trepan, ALTSHULER, BERZON, NUSSBAUM, RUBIN & DEMAIN, San Francisco, California, Sandra R. Benson, VAN BOURG, WEINBERG, ROGER & ROSENFELD, Oakland, California, for Intervenor. Heather L. MacDougall, McGUINESS, NORRIS & WILLIAMS, Washington, D.C., for Amicus Curiae.

The Honorable Curbs L. Collier, United States District Judge for the Eastern District of Tennessee, sitting by designation.

OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge. In the midst of a contentious labor dispute, the petitioner, BE&K Construction Company, filed suit in federal court in California against numerous labor organizations. The purpose of the lawsuit was to squelch certain concerted activity in which the unions were engaging on behalf of members who were on the BE&K construction site as employees of various sub-contractors and to ensure safe working conditions on the job-site. When the district court denied the requested relief, the unions filed complaints with the National Labor Relations Board, alleging that BE&K's court filings constituted an unfair labor practice. Based on the Supreme Court's ruling in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731(1983), the Board agreed with the unions and ordered the petitioner to cease and desist from its illegal activities and, additionally, ordered the company to reimburse the unions for their attorneys' fees and costs. From that decision, the petitioner seeks review, contending (1) that the opinion in *Bill Johnson's* does not apply to non-employee unions; (2) that the district court suit in California did not constitute an unfair labor practice because it did not completely lack a reasonable basis; (3) that there was not substantial evidence to support the Board's ruling that the California litigation was retaliatory; and (4) that the Board was not justified in awarding costs and fees against the petitioner. Also before this court is the Board's related petition for enforcement of its order. For the reasons detailed in this opinion, we conclude that BE&K's petition for review should be denied and the Board's petition for enforcement granted.

FACTUAL AND PROCEDURAL BACKGROUND

In late *1986* or early *1987*, BE&K, an industrial general contractor operating throughout the United States, contracted with USS-POSCO Industries, Inc., to modernize a steel mill in Pittsburg, California. BE&K then formed a joint venture with Eichleay Constructors, Inc., to perform the contract work. According to BE&K, various union groups objected to the BE&K agreement with USS-POSCO because BE&K maintained no collective bargaining relationship or agreement with the unions. BE&K contends that in retaliation for USSPOSCO awarding the modernization contract to a non-union contractor, the unions engaged in various activities to delay the project. Specifically, BE&K maintains that the unions: advocated the adoption and enforcement of a toxic waste emission standard for the construction project, even though the labor groups had no genuine concern that the modernization of the steel mill would be environmentally harmful; picketed and hand-billed at BE&K's premises without disclosing the nature of their disagreement with the company and encouraged employees of subcontractors to engage in a strike at the project; filed a civil action in California state court, *Pileabrivers, Divers, Bridge Wharf & Dock Builders Union Local 34, AFL-CIO, et al. v USSPOSCO Indus., Inc., et al.*, alleging, among other things, violations of California's Health and Safety Code in an effort to delay the modernization project and increase costs; and initiated contract grievances against Eichleay Constructors, BE&K's joint venturer, under collective bargaining agreements that did not apply to Eichleay.

In response to what BE&K pejoratively terms the unions' "corporate campaign," USS-POSCO and BE&K filed suit in district court in California against numerous labor organizations pursuant to § 303 of the National Labor

Relations Act, *29 U.S.C. § 187,* seeking damages for the allegedly unfair tactics. The union defendants filed motions for summary judgment with the court, arguing that "the activities challenged in the first and third claims (legislative lobbying and filing lawsuits, respectively) are protected by the First Amendment," and that "because contractual grievance and arbitration proceedings are the preferred method of resolving labor disputes under federal labor policy," the fourth claim regarding initiation of grievance proceedings cannot result in tabor law liability. *See USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council, AFL-CIO, 692* F. Supp. *1166, 1168* (N.D. Cal. *1988).*

Relying upon the rationale adopted by the United States Supreme Court in *Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983),* the district court granted summary judgment to the union defendants on the companies' legislative lobbying claim (Claim 1). As noted by the district court:

> The lobbying of state and local legislative bodies implicates the same First Amendment and federalism concerns at issue in *Bill Johnson's Restaurants*. The right to petition a legislative body falls squarely under the "umbrella of `political expression'." As for federalism concerns, this Court will not lightly infer a Congressional intent to "ignore the substantial state interest in protecting the health and well-being of its citizens." Such an interest is clearly at stake when a toxic waste law is under consideration by a local legislative body.

USS-POSCO Indus., 692 F. Supp. at *1169-70* (citations omitted).

Summary judgment was also granted to the defendants on Claim (initiating collective bargaining grievances). In so ruling, the district court relied upon the fact that even USS-POSCO's and BE&K's own exhibits indicated that the

challenged grievances had been successful and, "[a]s **with** well-founded state lawsuits, successful grievances to enforce lawful provisions of a collective bargaining agreement cannot constitute unfair labor practices . . . ." Id. at *1170.*

Finally, summary judgment was denied, without prejudice, on the claim that the unions improperly filed a state court action against the companies. In making that ruling, the district judge noted that, while the right of access to the courts is a protected First Amendment right, a baseless state suit receives no such protection. The court thus allowed the parties additional time for discovery in order to ascertain whether the unions' state court lawsuit was indeed baseless. *See id.* at 1170.

Subsequently, after the dismissal of two of USS-POSCO's and BE&K's claims against the defendant unions, USS-**POSCO and BE&K** filed an amended complaint that not only included some claims similar to those upon which the court had previously granted summary judgment, but also a claim that alleged, for the first time, violations of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. In response to dispositive motions filed by the union defendants, the district court dismissed the amended complaint as "unacceptable because the first cause of action includes a restatement of several of the claims upon which summary judgment for defendants has already been granted by the Court." The court **did grant USS-POSCO and BE&K** leave to revise the amended complaint, however, so as to bring the filing in line with existing court rulings.

In that same order, the district court also dismissed USS-POSCO's and BE&K's unfair labor practice claim that was based upon the unions' prosecution of a state court action seeking redress for alleged safety violations at company sites. First, the court dismissed that part of the claim that

sought imposition of liability upon two union locals, Steamfitters Local 342, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, and Local 302 of the International Brotherhood of Electrical Workers, AFL-CIO, because those organizations were not parties to the state court litigation. Second, the court dismissed the claim against the remaining union defendants who had been parties to the state action because the federal court concluded that the companies failed to demonstrate that the state claims had been without a reasonable basis in law. In fact, although noting that the unions had failed in the state proceeding to obtain either a temporary restraining order or a preliminary injunction against the companies, the district court recognized that, as a result of the court filing by the unions, federal investigators from the Occupational Safety and Health Administration found "numerous health and safety violations" at the job-site. Consequently, the companies were unable to cite to any evidence "which could support a finding that no reasonable legal and factual basis existed for the filing of the state court action."

Eventually, USS-POSCO and BE&K filed a second amended complaint with the district court. In that document, the companies reasserted many of the same claims they had previously advanced, specifically the allegations of antitrust violations; improper picketing, lobbying, and hand-billing; and improper filing of grievances and court actions. The district court dismissed the complaint insofar as it raised allegations already addressed in prior rulings. Further, because USS-POSCO and BE&K continued to raise such issues, the court imposed sanctions upon the plaintiffs pursuant to Rule 11 of the Federal Rules of Civil Procedure. USS-POSCO then dismissed, with prejudice, its other claims against the unions; as a result, the remaining issues

went forward through the discovery process with only BE&K as a party plaintiff.

By court order, however, the district court limited the scope of BE&K's discovery requests. Because the court concluded that the company, in order to succeed on its antitrust claims, must prove both that the unions improperly combined with non-labor groups *and* that the combination had occurred for an illegitimate purpose, the district judge first ordered that discovery be limited to the issue of whether BE&K could establish that the unions actually combined with non-labor entities. *See USS-POSCO Indus. v. Contra Costa CountyBldg. & Constr. Trades Council, AFL-CIO,* 31 F.3d 800, 804 (9th Cir. 1994). Because the company could not adduce any evidence in support of that prong of the court-defined analysis, the district judge granted the unions' motion for summary judgment on the antitrust cause of action. At that point in the proceedings, BE&K voluntarily dismissed the remaining allegations of labor law violations, which asserted that the unions had illegally fomented violence against the company. Following entry of final judgment, BE&K appealed to the United States Court of Appeals for the Ninth Circuit, contending that the district court had erred in its explication of antitrust law and in its imposition of sanctions pursuant to Rule 11.

The Ninth Circuit agreed with BE&K that the district court erred in concluding that an adversary must establish both that a union combined with a non-labor group and that the union did not act in its legitimate self-interest before the labor organization's statutory exemption from antitrust liability could be circumvented. Nevertheless, the court found that any error in the district court's analysis was harmless because application of the *Noerr-Pennington* doctrine also provided **antitrust** immunity to the unions while lobbying government officials or while petitioning administrative agencies or courts, unless Ihe party was

engaged in "sham" petitioning. *See id.* at 810.[1] Despite BE&K's arguments to the contrary, the court refused to conclude that the unions' lawsuits were frivolous and brought without regard to the merits. As noted in the court's opinion:

> Here .... fifteen of the twenty-nine lawsuits alleged by BE&K as part of the pattern of filings "without regard to the merits" have proven successful. The fact that more than half of all the actions as to which we know the results turn out to have merit cannot be reconciled with the charge that the unions were filing lawsuits and other actions willy-nilly without regard to success.

Id. at 811 (footnote omitted). Consequently, the court affirmed the district court's dismissal of the antitrust claims against the unions; however, the appellate tribunal also reversed the lower court's award of Rule 11 sanctions on the ground that the company re-pleaded previously-dismissed claims in its amended complaint only out of a legitimate, although incorrect, belief that such re-allegation was necessary to preserve the issues for future appeal. Id. at 811-12.

During the pendency of these various court proceedings, the NLRB had held in abeyance unfair labor practice complaints originally lodged by two union locals (and joined by numerous other labor organizations) shortly after **USS-POSCO** and BE&K filed suit against them in California district court. With the conclusion of that litigation, the NLRB reasserted jurisdiction over the administrative complaints and determined that the companies had indeed attempted to retaliate against the unions and their members

[1] *Noerr-Pennington* immunity principles are derived from the holdings of the United States Supreme Court in *Eastern Railroad Presidents Conference v. NoerrMotor Freight, Inc., 365 U.S. 127 (1961),* and *United Mine Workers v. Pennington, 381 U.S. 657 (1965).*

for engaging in activities protected by federal labor legislation by filing the meritless lawsuit. The Board thus ordered BE&K to cease and desist from such illegal actions and directed the company to pay the legal fees and expenses incurred by the union defendants in the USS-POSCO litigation. From that Board decision, BE&K now petitions to this court for review. The Board has also availed itself of the jurisdiction of this court, seeking enforcement of the Board's order.

DISCUSSION

1. Ability of Non-Employee Union to Seek Relief Under Federal Labor Law

Pursuant to the provisions of § 7 of the National Labor RelationsAct:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment . . . .

29 U.S.C. § 157. Moreover, § 8(a)(1) of that same act, 29 U.S.C. § 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce *employees* in the exercise of the rights guaranteed in section 157 . . . ." (Emphasis added.)

The Board concluded in this case that BE&K's filing of a federal court action against the union defendants amounted to

just such an unfair labor practice under § 8(a)(1) of the Act. BE&K, of course, disagrees and first asserts that it is **interference** only with employees, and not with unions, that is prohibited by the Act. Both the company and the unions do agree, however, that the starting point for any analysis of this issue is the seminal decision of the United States Supreme Court in *Bill Johnson's.*

In that case, the Court noted potential First Amendment implications if the Board sanctioned an employer for exercising its right to petition the courts for a redress of grievances. *See Bill Johnson's,* 461 U.S. at 741. Where the lawsuit initiated by the employer lacks a reasonable basis in fact or law, however, and where the action was filed to retaliate against the employee or employees for engaging in activity protected by federal labor legislation, the First Amendment concerns are ameliorated and the Board may actually enjoin the prosecution of the case. The Court went on to hold that, in situations in which the employer has already availed itself of the protections of the court system and a judgment adverse to the plaintiff has been rendered, there is no need to meet the heightened burden required to be satisfied when an employee seeks to enjoin an ongoing judicial proceeding. In fact, the governmental interest in ensuring a forum for redress of wrongs has been fulfilled in such instances and Board action is justified upon a showing only of an unmeritorious, rather than "baseless," lawsuit filed for a retaliatory purpose. *See id.* at 749.

Indisputably, the explicit language of *Bill Johnson's* refers only to the potential improprieties of employer-initiated lawsuits filed against *employees* engaged in protected activities. However, *Bill Johnson's* language regarding such suits was restricted to those circumstances, and not to suits filed against *unions,* simply because the Court appropriately

addressed only the case then before it. *See Geske & Sons, Inc. v. NLRB,* 103 F.3d 1366, 1377 (7th Cir. 1997).

Nevertheless, BE&K contends that subsequent Supreme Court pronouncements took that next analytical step that was not appropriate in *Bill Johnson's.* Specifically, the company notes that the Court's decision in *Lechmere, Inc. v. NLRB,* 502 U.S. 527, 532 (1992), explained that, "[b]y its plain terms .... the NLRA confers rights only on *employees,* not on unions or their nonemployee organizers." Again, however, an understanding of the nature of the dispute that precipitated the *Lechmere* decision places the Court's seemingly all-inclusive statement in a more restrictive context. In *Lechmere,* the Supreme Court was asked to resolve a dispute concerning the asserted rights of an organizing union to enter upon prorate property to distribute handbills to company employees to whom the union had alternative means of access. Although ruling that unions had no right under the Act to trespass upon private property *under the circumstances presented in that case,* the Court also recognized that § 7 of the Act, by necessary implication, extended some legislative protection to unions.[2] Citing its earlier decision in *NLRB v. Babcock* & Wilcox Co., 351 U.S.

---

[2] Similarly, the Sixth Circuit decision in *Johnson & Hardin Co. v. NLRB,* 49 F.3d 237 (6th Cir. 1995), upon which BE&K also relies, involved only a situation in which nonemployee union members trespassed onto private property in order to distribute handbills to Johnson & Hardin employees. As a result, that case also stands for the proposition that nonemployee organizers may enter onto private property only under extremely limited circumstances. The case does not, however, stand for the broader legal principle that unions have no § 7 rights whatsoever. *See also Cleveland Real Estate Partners v. NLRB,* 95 F.3d 457, 463 (6th Cir. 1996) (recognizing that "there is a substantial difference between the rights of employees and of nonemployees with respect to the distribution of union literature on privately owned property), *overruled on other grounds in NLRB v. Webcor Packaging, Inc., 118* F.3d 1115, 1119 (6th Cir. 1997).

105, 113 (1956), the Court stated "that insofar as the employees' `right of self-organization depends in some measure on [their] ability . . . to learn the advantages of self-organization from others,' § 7 of the NLRA may, in certain limited circumstances, restrict an employer's right to exclude nonemployee union organizers from his property." *Lechmere,* 502 U.S. at 532.

BE&K insists that the "core" right of self-organization is not implicated in this matter and that the non-employee union defendants are thus not entitled to the protections of § 7. Without question, courts have constructed a hierarchy of labor rights, at the highest levels of which is the effort by employees to organize for their collective good. Furthermore, because of the importance of that concerted activity, courts have accorded to organizing unions a "derivative right" to engage in such actions. *See NLRB v. Great Scot, Inc.,* 39 F.3d 678, 682 (6th Cir. 1994). In fact, as the Seventh Circuit has explained, "[i]t would be anomalous to hold that an employer may not interfere with its employees' right to organize by filing baseless lawsuits against them, but that it may achieve the same result by filing a baseless lawsuit against a union **attempting** to organize the employees." *Geske,* 103 F.3d at 1377.

Alhough the activities in which the union defendants in the USS-POSCO litigation engaged did not involve overt attempts at organization, some accommodation of those actions by an employer may still be required under applicable labor law. *See, e.g., O'Neil's Markets v. United Food and Commercial Workers' Union, Meatcutters Local 88, 95* F.3d 733, 737 (8th Cir. *1996)* ("although area standards hand-billers are not engaging in `core' organizing activities and therefore may deserve fewer accommodations, private property owners may, under certain circumstances, be obligated to accommodate them"). Indeed, such an obligation

may be imposed even though the members of the union are not even employees of the targeted company.

The term "employee," as used in the National Labor Relations Act, is accorded a broad meaning indeed. Pursuant to the express provisions of *29 U.S.C. § 152(3),* the term "employee" (who may, under § 7 of the Act, engage in activities for "mutual aid and protection") "shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise." The Supreme Court, in *Eastex, Inc. v. NLRB, 437 U.S. 556, 564* (1978), has explained that "[t]his definition was intended to protect employees when they engage in otherwise proper concerted activities in support of employees of employers other than their own." Moreover, the statutorilyprotected "employees" may seek improvement of employment terms and conditions through channels outside the immediate employer-employee relationship, including resort to administrative and judicial forums and to legislative appeals. *See id.* at *565-66.* Otherwise, as explained in *Eastex:*

> To hold that activity of this nature is entirely unprotected - irrespective of location or the means employed - would leave employees open to retaliation for much legitimate activity that could improve their lot as employees. As this could "frustrate the policy of the Act to protect the right of workers to act together to better their working conditions," we do not think that Congress could haveintended the protection of § 7 to be as narrow as petitioner insists.
>
> Id. at *566-67* (citation omitted).

In this case, the lobbying and petitioning in which the unions participated was intended to protect the health of BE&K employees and improve safety conditions at company worksites, as well as to vindicate the rights of

sub-contractor employees. Attainment by the unions of even site-specific improvements or promises of diligent enforcement of existing health and safety standards, moreover, clearly establishes helpful precedent for future labor actions and serves to improve, through concerted action, the lot of all working women and men in similar situations. As such, the work of the unions in this case is not so attenuated from the interests of BE&K employees that the "activity cannot fairly be deemed to come within the `mutual aid or protection' clause" *of § 7. Id.* at *568.* Consequently, the Board decision to apply *Bill Johnson's* principles to the *unions'* activities in this case is proper. As held by the Board in this matter:

It would be a curious and myopic reading *of* these core provisions of the Act [(§ *7's* provision of the right to self-organization and of the right to engage in concerted activity for mutual aid or protection)] to hold that, although employees are free to join unions and to work through unions for purposes of "other mutual aid and protection," the conduct of the unions they form and join for those purposes is not protected by the Act. Under that reasoning, conduct that is protected when engaged in by two or more employees together would lose its protection if engaged in by the employees' union on their behalf.

We note further that, in the week prior to oral argument in this matter, the United States Court of Appeals for the District of Columbia filed its decision in *Petrochem Insulation, Inc. v. NLRB, 240* F.3d *26 (D.C.* Cir. *2001),* a case raising many of the same issues presented here and even citing the Board's decision in the claims against BE&K. In *Petnochem Insulation,* the D.C. Circuit also concluded that unions, as well as employees, are entitled to the protections afforded by § 7 and the principles enunciated in *Bill*

Johnson's. Today, we thus join our sister circuit in that interpretation of federal labor law.

II. Bill Johnson's Liability

A. "Unmeritorious" v. "Lack of Reasonable Basis"

BE&K next contends that even if unions may assert derivative § 7 rights, the Board's decision that the company committed an unfair labor practice by filing suit against the unions in federal court in California is incorrect. According to BE&K, before it may be punished administratively for availing itself of the judicial process, the Board must determine that the company's suit completely lacked a reasonable basis. The explicit language of controlling Supreme Court precedent does not, however, impose such a burden upon the administrative agency.

In *Bill Johnson's,* the Supreme Court recognized that "[a] lawsuit no doubt may be used by an employer as a powerful instrument of coercion or retaliation" because "[r]egardless of how unmeritorious the employer's suit is, the employee will most likely have to retain counsel and incur substantial legal expenses to defend against it." Bill *Johnson's, 461 U.S.* at 740-41. Furthermore, "the chilling effect of a . . . lawsuit upon an employee's willingness to engage in protected activity is multiplied where the complaint seeks damages in addition to injunctive relief." Id. at 741. Nevertheless, the employer's right of access to the courts remains an aspect "of the First Amendment right to petition the Government for redress of grievances." Id.

In balancing those countervailing interests, the Court distilled certain principles that are of assistance in addressing BE&K's allegations of error in this case. First, "[t]hefiling and prosecution of a well-founded lawsuit may

not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act." Id. at 743. Second, the Board may enjoin "the prosecution of an improperly motivated suit lacking a reasonable basis." Id. at 744. Finally, and most important for purposes of this litigation:

In instances where the Board must allow the lawsuit to proceed, if the employer's case in the state court ultimately proves meritorious and he has judgment against the employees, the employer should also prevail before the Board, for the filing of a meritorious lawsuit, even for a retaliatory motive, is not an unfair labor practice. If judgment goes against the employer in the state court, however, or if his suit is withdrawn or is otherwise shown to be without merit, the employer has had its day-in court, the interest of the State in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the § 8(a)(1) and § 8(a)(4) unfair labor practice case. The employer's suit having proved unmeritorious, the Board would be warranted in taking that fact into account in determining whether the suit had been filed in retaliation for the exercise of the employees' § 7 rights. If a violation is found, the Board may order the employer .o reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses._

Id at 747.

Despite BE&K's attempts to draw fine distinctions from Bill Johnson's, the Board appropriately concluded in this matter that the federal district court in California had already determined that the company's claims against the unions were all either without merit or voluntarily dismissed. Because the Board's general counsel was not, therefore,

attempting to *enjoin* a parallel proceeding, there was no need for the Board to establish that BE&K's allegations were without a reasonable basis in fact or law. Instead, because the judicial branch of government had already determined that BE&K's claims against the unions were unmeritorious or dismissed, evidence of a simple retaliatory motive. would suffice to adjudge the company guilty of committing an unfair labor practice. The mere failure of company to prevail on its claims against the union in regular judicial proceedings was sufficient to strip BE&K of some of its First Amendment protection because of the company's prior opportunity to avail itself of a judicial forum for redress of its grievances. *See also Johnson & Hardin,* 49 F.3d at 243 ("if the employer does not prevail - the state court judgment is adverse or the suit is withdrawn or otherwise shown to be without merit - the Board may then decide whether the suit was filed with a retaliatory motive"); *NLRB v. Vanguard Tours, Inc.,* 981 F.2d 62, 65 (2d Cir. 1992) (once the employer has lost court action on the merits "-- even if he had a reasonable basis in bringing **suit -- the Board** may consider4he filing of the suit to have been an unfair labor practice").[3]

BE&K directs this court to the Supreme Court decision in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.,* 508 U.S. 49 (1993), in support of its contention that the Court's most recent pronouncements indicate that only baseless or "sham" suits serve to restrict the

[3] In Vanguard Tours, the Second Circuit did rule that withdrawal of a suit, as opposed to a decision on the merits, should call for the higher standard of lack of a reasonable basis in fact or law before finding an unfair labor practice for filing suit in retaliation for exercise of § 7 rights. *See 981* F.2d at 66. That case, however, did not address the situation in which the majority of a plaintiff's cause of action is dismissed *on the* merits and only a portion is voluntarily withdrawn. Furthermore, the court recognized that the applicable language from Bill *Johnson's* could be read for the proposition "that withdrawal of the suit is equivalent to a judgment against the employer." td.

otherwise unfettered right to seek court resolution of differences. That decision, however, involved only a claim of *Noerr-Pennington* immunity from *antitrust* liability.

Moreover, in analogizing the situation presented in that case to the principles discussed in *Bill Johnson's,* the Court referred solely to labor law situations in which attempts were made *to enjoin* employer-initiated litigation, not situations in which court rulings had already been rendered. Id. at *59.* Thus, the principles BE&K seeks to extract from *Professional Real Estate Investors* are totally inapplicable to the circumstances presently before us in this case. *See Petrochem Insulation, 240* F.3d at 31-2.

The law as interpreted by the Supreme Court in *Bill Johnson's* and by this circuit in *Johnson & Hardin* creates a bifurcated system of analysis in determining the protections to be afforded an employer for filing retaliatory lawsuits against employees and unions. Prior to a court ruling on the merits of the employer's suit, the Board will not find an unfair labor practice unless the underlying lawsuit was without reasonable basis. Following a court determination that the employer's claims are without merit, however, there is no longer a need to prevent interference with the First Amendment right to seek judicial redress. At that point, the Board is justified in examining the motives of the employer to determine whether the company unfairly dragged the workers or their representatives into court to further illegal objectives.

In this case, the California district court ruled *on the merits* that BE&K could not succeed on its claims against the unions. Such a finding of an unmeritorious court action is thus sufficient to justify a subsequent investigation by the Board into the motives of the company in filing its lawsuit.

B. Retaliatory Motive

In arguing that the Board erred in **finding that BE&K filed** its suit against the unions with a retaliatory motive, the company contends that the Board inferred the requisite retaliation merely from the fact that BE&K failed on the merits of its underlying cause of action. While the Board did, in fact, mention the lack of merit of BE&K's lawsuit as *one consideration* in its determination of retaliatory motive, that factor was far from the only evidence in support of the Board's finding. Indeed, if it were, the Board would run the serious risk of conflating the two elements of the *Bill Johnson's* unfair labor practice analysis and thus infringe upon the protections afforded by the petition clause of the First Amendment. Instead, the record now before us contains substantial evidence, albeit circumstantial, from which the Board could reasonably infer a retaliatory motive in BE&K's decision to file suit against the defendant unions in California district court. *See Geske & Sons,* 103 F.3d at 1375 ("[m]otive or intent almost always must be inferred from circumstantial evidence").

First, the United States Supreme Court itself, in *Bill Johnson's,* admitted that the mere finding that an employer's suit against employees (or unions) is unmeritorious warrants the Board "taking that fact into account in determining whether the suit had been filed in retaliation for the exercise of the employees' § 7 rights." Bill *Johnson's, 461 U.S.* at 747. Such a judicial finding was indeed made in this instance.

Second, after much of BE&K's original suit had been dismissed by a summary judgment ruling in favor of the defendant unions, the company filed amended complaints that not only re-alleged many of the same claims upon which the district court had already ruled, but also sought

treble damages from the defendants for alleged antitrust violations in banding together for protected § 7 activities. As determined by the Ninth Circuit in *Diamond Walnut Growers, Inc. v. NLRB,* 53 F.3d 1085, 1089 (9th Cir. 1995), the simple request for such punitive damages is another factor to be considered in evaluating an employer's motive in prosecuting its lawsuit.

Finally, an additional inference of retaliatory motive may be made from the fact that BE&K sought recompense from two union organizations for a previous lawsuit filed by other union officials, even though the two union locals admittedly were not parties to the precedent legal action (the *Piledrivers* suit). Even after labor attorneys called this information to BE&K's attention, moreover, the company refused to dismiss the two locals, despite BE&K's failure to uncover, after extensive discovery, any evidence of participation by those parties in the prior litigation. In response, BE&K argues that the continued prosecution of the civil action against the two locals resulted only from the business's belief that all the local unions, even those that were not parties, were "jointly responsible for a jointly devised and executed series of sham proceedings." The very disingenuousness portrayed by such an argument lends additional support to the conclusion that BE&K harbored a deep, anti-union bias that led it to retaliate against the organized labor movement for engaging in governmental petitioning and judicial proceedings protected by the federal constitution and by federal labor legislation.

The plain language of the National Labor Relations Act directs that "[t]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." 29 U.S.C. § 160(e). Because substantial evidence in the record convincingly indicates that BE&K did indeed possess an

improper, illegal, retaliatory motivation in prosecuting its suit against the union defendants, this court is duty-bound to accept that determination.

III. Propriety Of Award Of Attorneys' Fees

Having found that the defendant unions can indeed assert § 7 rights in a situation such as that presented here, and having determined that BE&K committed an unfair labor practice by filing a meritless suit against the unions with a retaliatory motivation, we must still determine whether the Board was within its power in awarding attorneys' fees to the unions to compensate them for defending against BE&K's filings. The plain language of the National Labor Relations Act and of the Supreme Court's *Bill Johnson's* decision, as well as the underlying purposes of national labor legislation, demand an affirmative response.

BE&K relies upon *dicta* in the Sixth Circuit's decision in *Johnson & Hardin* for the proposition that "the harsh remedy of a grant of attorneys' fees" should be invoked only to "discourage future frivolous litigation." *Johnson & Hardin,* 49 F.3d at 244. Such dicta, however, was discussed in a situation in which the employer was found *not* to have committed a *Bill Johnson's* unfair labor practice. Any discussion of the propriety of an attorneys' fee award in that case was thus without force or effect in future decisions. Moreover, the authorities cited by this court in *Johnson & Hardin* for the proposition now espoused by BE&K were decisions pre-dating the Supreme Court's *Bill Johnson's* ruling.

By contrast, in Bill *Johnson's* itself, the Court specifically, and without further qualification, stated that, "if *a violation [of § 7 rights in a scenario like that presented in this appeal] is found,* the Board may order the employer to reimburse the

[parties] whom he had wrongfully sued for their attorney's fees and other expenses. It may also order any other proper relief that would effectuate the policies of the Act." *Bill Johnson's, 461* U.S. at *747* (emphasis added).[4] Moreover, the Court had previously explained:

> The Board's power [to fashion remedies under 29 U.S.C. § 160(c)] is a broad discretionary one, subject to limited judicial review. The relation of remedy to policy is peculiarly a matter for administrative competence. In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience. The Board's order will not be disturbed unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.

Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 216 (1964) (citations and internal punctuation omitted). *See also Geske & Sons,* 103 F.3d at 1378.

In light of the indisputable rulings in these two Supreme Court decisions, if we were to refuse to enforce the Board's order that BE&K reimburse the unions for their attorneys' fees, we would be crossing the line demarcating not only the division of functions of the judicial and executive branches of government, but also the line dividing judicial and legislative areas of authority. The Board's order in this matter could

---

[4] In fact, 29 U.S.C. § 160(c) plainly instructs:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as *will effectuate the policies of this subchapter .... (emphasis added).*

never be construed as "a patent attempt" to frustrate the policies of the Act. In fact, the award of attorneys' fees is nothing more than an effort to correct the effects of BE&K's unfair labor practice by returning the injured parties, at least in part, to the financial positions they occupied prior to the filing of the company's unmerited, retaliatory suit. Moreover, the award replenishing union coffers serves the laudable goal of benefitting a broad range of laborers whose dues dollars initially financed the defense of the federal court action and who stand to benefit from the unions' attempts to enforce health, safety, and zoning regulations.

Furthermore, adherence to the policy advocated by BE&K to reserve attorneys' fee awards to those cases in which the non-prevailing party pursued a frivolous, as opposed to a merely unmeritorious, action evidences a basic misunderstanding of the purpose of the attorneys' fee award in this instance. As stated by the Board in its ruling:

> We do not award attorneys' fees in Bill *Johnson's* cases because employers' suits are *frivolous.* We award them because the suits are *unlawful;* they themselves constitute the unfair labor practices for which a remedy must be provided. As the court of appeals correctly observed in *Geske & Sons,* the Unions would not have incurred those attorneys' fees except for the Respondent's meritless lawsuit, and it is both appropriate and necessary to order that they be made whole and to provide an economic disincentive for engaging in similar unlawful conduct.

BE&K Constr. Co., 329 NLRB No. 68 at *12* (Sept. *30, 1999).*

Our review of remedial action ordered by the Board is extremely limited. Because the award of attorneys' fees to the unions in this matter upon the finding of an unfair labor practice is inherently consistent with the underlying purposes

of the National Labor Relations Act, any attempt to undo the administrative sanction would unnecessarily intrude upon the province of a co-equal branch of government acting within constitutional parameters.

CONCLUSION

In this case, BE&K admits that it filed a federal court action against the union defendants in an effort to coerce the unions to cease their administrative and judicial petitioning for strengthened working standards and for stricter enforcement of health and safety requirements. Because the unions, acting on behalf of affected workers, were engaged in activities protected alternatively by the federal labor laws or by the First Amendment's right to seek redress of grievances, the Board properly determined that BE&K's effort to subvert those plans constituted an unfair labor practice. Moreover, to effectuate the policies of the National Labor Relations Act and to return the unions to the position in which they would have been without having to defend the unlawful lawsuit, the Board acted within its broad powers to order BE&K to reimburse the unions for their costs and attorneys' fees. Consequently, we must DENY BE&K's petition for review of the Board decision and GRANT the Board's request for enforcement of that ruling.

99-6469/00-5012

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BE & K CONSTRUCTION COMPANY,)
)
Petitioner/Cross-Respondent,)
)
v.)
) ORDER
NATIONAL LABOR RELATIONS)
BOARD,)
)
Respondent/Cross-Petitioner.)
)
STEAMFITTERS LOCAL 342, ET AL.,)
)
Intervenors.)

BEFORE: DAUGHTREY and GILMAN, Circuit Judges; and COLLIER,* District Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

*Hon. Curtis L. Collier, United States District Judge for the Eastern District of Tennessee, sitting by designation.

DECISION OF THE NATIONAL LABOR RELATIONS BOARD

BE & K CONSTRUCTION CO.

329 NLRB No. 68

BE & K Construction Company and Steamfitters Local 342, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO and Local 302, International Brotherhood of Electrical Workers, AFL-CIO and District Council of Iron Workers of the State of California and Vicinity, International Union of Bridge, Structural and Ornamental Iron Workers, AFL-CIO and Contra Costa County Building And Construction Trades Council, AFL-CIO and Northern California District Council Of Laborers, Laborers International Union Of North America, AFL-CIO and Bay Counties District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO and Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL-CIO and Local Union No. 378, International Union of Bridge, Structural and Ornamental Iron Workers, AFL-CIO and Cement Masons Union Local No. 825, Operative Plasterers and Cement Masons International Association, AFL-CIO and Local No. 549, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO. Cases 32-CA-9474, 32-CA-9475 and 32-CA-12531-1-8

September 30, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On October 18, 1995, the General Counsel of the National Labor Relations Board issued a consolidated complaint alleging that the Respondent had violated Section 8(a)(1) of the Act. The Respondent filed an answer admitting in part and denying in part the complaint allegations and raising certain affirmative defenses.

On March 13, 1996, the General Counsel filed a Motion for Summary Judgment and memorandum in support, with exhibits attached. The General Counsel submits that the Respondent's answer raises no material issues of fact requiring a hearing. On March 18, 1996, the Board issued an order transferring the proceeding to the Board and Notice to Show Cause why the motion should not be granted.[5] The Respondent filed an opposition to the motion and a cross-motion for summary judgment in its favor. The General Counsel filed a reply brief, the Charging Parties filed briefs in support of the General Counsel and in opposition to the Respondent, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motions for Summary Judgment

The principal issue in this case is whether the Respondent violated Section 8(a)(1) by filing and maintaining a civil lawsuit against the Charging Party Unions in Federal district court. The General Counsel and the Unions contend that the Respondent's suit lacked merit because, except for certain claims that the court dismissed with prejudice at the Respondent's request, the court granted the Unions' motions for summary judgment in their favor. The General Counsel and the Unions further argue that the Respondent sued the Unions in retaliation for their having engaged in activities protected by Section 7 of the Act. Because the suit lacked

[5] On March 21, 1996, the Board issued an amended order.

merit and was filed for retaliatory purposes, the General Counsel and the Unions urge that, under Bill Johnson's Restaurants v. NLRB,[6] the Board should find that it was unlawfully filed and maintained, and should require the Respondent to reimburse the Unions for attorneys' fees incurred as a result of the suit. The General Counsel and the Unions also dispute the Respondent's contention that certain allegations of the complaint are untimely.

The Respondent contends that its suit was lawful because, in its view, (1) the Unions' actions that were the subject of the suit were not protected by Section 7; (2) it prevailed in certain respects in the district court litigation; (3) the suit had a reasonable basis in fact and law; and (4) the suit was not filed with retaliatory intent. The Respondent also argues that some of the allegations of the complaint are time-barred by Section 10(b). Finally, the Respondent contends that even if it violated the Act, the Board should not require it to pay the Unions' attorneys' fees.

On the basis of the record presented, we find that there is no genuine issue as to any material fact and that the General Counsel is entitled to judgment as a matter of law. Thus, for the reasons discussed below, we agree with the General Counsel and the Unions that the Respondent's suit was unmeritorious and that it was filed in retaliation against the Unions' protected activities. We also reject the Respondent's contention that some of the complaint allegations are time barred. We therefore find that the Respondent's suit violated Section 8(a)(1) as alleged. We also find it appropriate to order the Respondent to make the Unions whole by reimbursing them for the attorneys' fees they incurred in defending against the suit. In sum, we shall grant the General Counsel's motion for summary judgment and deny the Respondent's motion.

[6] 461 U.S. 731 (1983).

On the entire record, the Board makes the following

FINDINGS OF FACT

For the purposes of deciding the issues raised in the Motions for Summary Judgment, the factual record in this case comprises the admitted allegations of the complaint, other admissions made by the parties, and the facts actually found by the courts.[7] We make this statement because the Respondent asserts that a number of the allegations contained in its various claims were accepted as true by the courts and must be treated as facts by the Board. With that assertion we emphatically disagree.

There is no dispute that the Unions did, in fact, engage in some of the conduct-filing a state court lawsuit, instituting grievance and arbitration proceedings, and engaging in certain lobbying activities-that the Respondent argued was unlawful. The courts found those actions not to be unlawful, even if, as the Respondent contends, they were undertaken with a secondary objective. Other actions alleged to be unlawful were the subject of claims that the Respondent withdrew with prejudice; the court made no factual determinations regarding them. The Respondent nevertheless argues that the record in the court proceedings establishes that all of its factual allegations are true, including its allegations of an unlawful secondary objective.

---

[7] We shall also consider the affidavits and declarations attached to the parties' briefs. It is well settled that, in ruling on a motion for summary judgment, we are required to construe the facts in the light most favorable to the nonmoving party. Therefore, when ruling on the General Counsel's motion, we shall assume the facts as represented by the Respondent are true unless they have been determined to be otherwise by the courts. In ruling on the Respondent's motion, we shall give like treatment to the facts as represented by the General Counsel and the Unions.

There is no merit to that contention. The courts, in granting the Unions' motions for partial summary judgment, were required to view the record in the light most favorable to the Respondent as the nonmoving party.[8] In finding that the Unions were entitled to judgment as a matter of law, the courts had to assume the facts were as the Respondent alleged, not to find them so. It is plain from their decisions that the courts considered the Respondent's allegations and found that those allegations, even if true, would not support a conclusion that the Unions had acted unlawfully. The courts did not find, as facts, either that the Unions engaged in the conduct that was the subject of the withdrawn claims or that they acted from an unlawful secondary motive.[9]

I. JURISDICTION

The Respondent, BE&K Construction Company, is a Delaware corporation with headquarters in Birmingham, Alabama. It is engaged in industrial general contracting throughout the United States. During the fiscal years

---

[8] 10 Wright & Miller, Federal Practice and Procedure, Civil 2d, Sec. 2716.

[9] The court of appeals did state that "the unions encouraged work stoppages by unionized employees because of well-founded safety concerns[,]" and "[t]hat these activities were not undertaken to unionize this particular employer but in order to eliminate non-union shops altogether by making an example of BE&K does not matter." USS-POSCO Industries and BE&K Construction Co. v. Contra Costa County Building & Construction Trades Council, AFL-CIO, et al., 31 F.3d 800, 809 (9th Cir. 1994). Although those statements might appear to be factual findings, we doubt the court meant them as such. Elsewhere, the court referred to the Unions' alleged conduct, and it did not indicate any basis for doing otherwise in the case of the quoted material. We think the court of appeals engaged in inartful drafting rather than fact-finding in the quoted passages.

immediately preceding the filing of each of the charges and preceding the date of the complaint, the Respondent annually provided services valued in excess of $50,000 to customers located outside the State of Alabama. The Respondent admits, and we find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that each of the Unions is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

USS-POSCO Industries (UPI) is a partnership formed by USX Corporation and Pohang Iron and Steel Company to modernize and operate a steel facility in Pittsburg, California. UPI awarded a construction contract to modernize that facility to the Respondent, which is a nonunion contractor. The Respondent formed a joint venture with Eichleay Constructors, Inc. (ECI) to perform the contract.

After the contract was awarded, the Unions allegedly began a campaign against the Respondent. According to the Respondent, that campaign was aimed at forcing UPI to enter into an unlawful prehire agreement in violation of Section 8(e), forcing UPI to cease doing business with the Respondent, and ultimately eliminating nonunion employers from the construction market in Contra Costa County and elsewhere in California.

On September 21, 1987, the Respondent and UPI filed suit under Section 303 of the Act in the U.S. District Court for the Northern District of California.[10] The complaint alleged that the Unions

---

[10] USS-POSCO Industries and BE&K Construction Co. v. Contra Costa County Building & Construction Trades Council, AFL-CIO, et al., No. C-87-4829 DLJ.

* Advocated the adoption and enforcement of a toxic waste ordinance in Contra Costa County, which would impede the progress of the modernization project, without any genuine belief that the project would harm the environment;

* Picketed and handbilled at the plaintiffs' premises without disclosing their identities or the true nature of their dispute with the plaintiffs, and induced and encouraged employees of the Respondent's subcontractors to engage in a strike at the project;

* Filed, in bad faith, a lawsuit in California state court (the Pile Drivers suit) alleging, among other things, violations of California's Health and Safety Code; and

* Initiated collective bargaining grievance proceedings against ECI under authority of collective-bargaining agreements that did not apply to ECI.

The complaint alleged that the Unions' conduct violated Section 8(b)(4)(ii)(A) and (B).

The Unions filed motions to dismiss or for summary judgment on three of the plaintiffs' four claims. The Unions argued that lobbying for the toxic waste ordinance and filing the Pile Drivers suit were protected by the First Amendment. They also argued that because the grievance and arbitration process is the preferred method of resolving labor disputes, resort to those proceedings should not be found unlawful.

On July 29, 1988, the court granted the Unions' motions in part and dismissed the allegations relating to lobbying and grievance filing. The court found that advocacy of the toxic waste ordinance and lobbying for its enforcement against the plaintiffs were protected by the First Amendment and did not

constitute unfair labor practices.[11] Concerning the Unions' grievance filing, the court noted that the grievances against ECI had been successful and that there was no contention that the provisions of the collective-bargaining agreement that the Unions sought to enforce were illegal. The court found it proper to allow further time for discovery on the claim relating to the Pile Drivers suit and denied without prejudice the Unions' motion to dismiss that claim.

On October 3, 1988, the plaintiffs filed an amended complaint for damages and injunctive relief. The amended complaint again alleged that the Unions' conduct violated Section 8(b)(4)(ii)(A) and (B). It also added the allegation that the Unions' conduct violated Sections 1 and 2 of the Sherman Act, and demanded treble damages and injunctive relief.

---

[11] 692 F. Supp. 1166. The court relied on the Noerr-Pennington doctrine, which holds that petitioning the government does not violate the Sherman Antitrust Act, 15 U.S.C. 1 et seq., unless the petitioning is a sham-i.e., in reality an attempt to interfere directly with competitors' business relationships and not a genuine effort to influence legislation and law enforcement practices. See Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965). The court noted that Noerr-Pennington had been adapted to the labor law context in Bill Johnson's, in which the Supreme Court held that filing a well-founded state court lawsuit does not constitute an unfair labor practice. 692 F.Supp. at 1169. It also observed that the "sham" exception includes instituting baseless, repetitive claims in an effort to bar competitors from meaningful access to courts and administrative agencies. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972). As there was no allegation that the Unions' activities were other than a genuine effort to influence legislation and law enforcement practices, or that the plaintiffs were denied meaningful access to present their own views before the Contra Costa County Board, the court found that they did not come within the sham exception to Noerr-Pennington. 692 F. Supp. at 1170.

The Unions moved for partial summary judgment, for dismissal of the amended complaint, and for sanctions. On May 1, 1989, the court granted the Unions' motion for partial summary judgment with regard to the plaintiffs' claim based on the Pile Drivers suit.[12] The court first noted that the plaintiffs had improperly sued even the Unions that were not parties to the Pile Drivers suit, and dismissed the suit against those Unions.[13] As to the remaining Unions, the court found, on the basis of discovery that had taken place since it issued the previous order, that the plaintiffs had failed to prove that the Pile Drivers suit lacked a reasonable basis in law. Although the Unions had not prevailed on the merits (the state court denied their motion for a temporary restraining order and for a preliminary injunction), the court noted that after the Pile Drivers suit was filed, the Federal Occupational Safety and Health Administration had investigated the jobsite and found a number of safety and health violations. As it found no genuine issue of material fact on the issue of health and safety problems on the jobsite at the time the Unions filed their suit, the court found that the plaintiffs had offered no evidence to support a finding that the Unions' suit lacked a reasonable basis in fact and law. The court therefore dismissed the plaintiffs' claim regarding the filing of the Pile Drivers suit.[14]

Turning to the amended complaint, the court held that the plaintiffs were within their rights in filing an amended complaint, but not in restating claims on which summary judgment had already been granted. The court therefore granted the Unions' motion to strike or dismiss the amended

---

[12] 721 F.Supp. 239.

[13] Id. at 241.

[14] Id. at 241-242.

complaint, but allowed the plaintiffs to file a revised amended complaint.

On May 22, 1989, the plaintiffs filed a second amended complaint, including allegations of all the dismissed claims, and adding a claim under the Clayton Act.[15] The plaintiffs stated that they were realleging the previously dismissed claims solely in order to preserve their right to appeal under their understanding of controlling Ninth Circuit precedent. In support of the complaint, the plaintiffs alleged a number of actions on the part of the Unions that they had not alleged in the original complaint. Those actions included

* Automatic petitioning of governmental entities for delay and harassment purposes, regardless of the merits of the petitions;

* Interfering with UPI's attempts to obtain necessary building permits;

* Instigating violent civil disorders at the UPI construction site;

* Filing and prosecuting a series of overlapping, repetitive, and sham lawsuits against the plaintiffs and others, without any reasonable expectation of success on the merits, simply to harass the defendants and to defeat the project through delay and inflation of costs;

* Making known to all interested parties that the Unions intended to file such suits and protests, but that they would withdraw and refrain from filing such actions if UPI and the Respondent would agree to use only union labor.

---

[15] 15 U.S.C. 15 and 26.

The Unions moved to strike or dismiss the second amended complaint and for sanctions. On August 24, 1989, the court granted the motion to strike with regard to the previously dismissed claims. It also rejected the plaintiffs' explanation for repleading the dismissed claims, and granted the Unions' motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure. On November 21, 1989, the court issued an order striking specific portions of the second amended complaint. In addition to the claims concerning lobbying for the toxic waste ordinance, filing the Pile Drivers suit, and grievance filing against ECI, the stricken paragraphs included those related to automatic petitioning of governmental entities, automatic protests of permits, and interference with UPI's efforts to obtain building permits.

On March 23, 1990, UPI moved for voluntary dismissal, with prejudice, of all its claims against the Unions. On March 27, 1990, the court granted the motion.

On June 8, 1990, the district court granted the Unions' motion to limit discovery concerning the Respondent's antitrust claim.[16] The court found that the statutory labor exemption to the antitrust laws, which does not apply to concerted action or agreements between unions and "non-labor parties," would exempt the Unions' conduct from antitrust liability unless the Respondent could show both a combination with non-labor groups and an illegitimate purpose in that combination. Accordingly, the court limited discovery to the issue of whether the Unions combined with contractors, manufacturers, of other commercial entities involved in the same market for construction services as the Respondents, and whether any such combinations were for purposes other than organizing the Respondent's employees and maintaining area standards.

---

[16] 134 LRRM 2590, modified 136 LRRM 2647 (July 26, 1990).

On July 25, 1991, the Unions moved for summary judgment on the Respondent's antitrust claim. The court granted the motion on September 5, 1991, noting that the Respondent had stated its nonopposition to the motion in light of the court's previous rulings.

In early 1992, the parties to the district court action entered into a stipulation that the Respondent's remaining claims for relief under Section 303 should be dismissed with prejudice. As part of the stipulation, the Respondent agreed to waive its right to appeal any matters contained in the claims that were not the subject of the court's previous orders.

On February 13, 1992, the court issued an order for the issuance of final judgment, noting that it had previously granted partial summary judgment in favor of the Unions on four of the Respondent's claims and that it had dismissed the other two claims with prejudice pursuant to the Respondent's motion for a voluntary dismissal with prejudice. The court thus ordered that final judgment should issue in favor of the Unions and against the Respondent, and that the Unions should recover their costs of the lawsuit.

The Respondent appealed to the United States Court of Appeals for the Ninth Circuit. On July 26, 1994, the court of appeals affirmed the district court's decision granting summary judgment in favor of the Unions on the Respondent's antitrust claim.[17] The court of appeals held, however, that the district court had erred in finding that to overcome the statutory labor exemption to the antitrust laws,

[17] 31 F.3d 800. Although the Respondent's original and amended notices of appeal indicated that other issues were being appealed, the court stated that the Respondent was actually appealing only the dismissal of its antitrust claims and the district court's imposition of sanctions. 146 LRRM at 2962.

the Respondent had to prove both that the Unions had combined with nonlabor groups and that the combination had an illegitimate purpose. The court of appeals therefore held that the lower court had erred in limiting discovery to the former element, because the Respondent could have established an antitrust violation by proving that the Unions' actions had an illegitimate purpose, even if they were not taken in concert with nonlabor groups. The court found a strong presumption that some of the allegedly unlawful actions-e.g., picketing and handbilling for organizing purposes, encouraging work stoppages over safety issues-were protected from antitrust liability. "More troublesome" were the allegations that the Unions automatically protested permits sought by the Respondent, lobbied for the passage of the toxic waste ordinance and for its enforcement against the Respondent, and brought frivolous lawsuits. The court found that such conduct is not per se exempt from the antitrust laws even if engaged in in pursuit of traditional union interests.

The court held, however, that the district court's error was harmless, because the Unions' actions were protected from antitrust liability under the First Amendment under the Noerr-Pennington doctrine. The court found that the Unions' conduct did not lose its protection under the "sham" exception to Noerr-Pennington. To come within the "sham" exception, the court held, the Unions' conduct must have been both objectively baseless, in the sense that no reasonable litigant could realistically expect to prevail on the merits, and intended to interfere directly with the Respondent's business relationships.[18] Because the Respondent alleged that the Unions had brought a whole series of legal actions without regard for the merits, the court found, the inquiry must be whether the actions were filed not

[18] See California Motor Transport, supra, and Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., 508 U.S. 49 (1993).

out of a genuine interest in redressing grievances, but essentially for purposes of harassment; thus, the Respondent's allegations, if proved, would overcome the Unions' Noerr-Pennington defense. The court found that the Unions' conduct had not lost its protection, however, because more than half of the actions filed by the Unions had proved successful. The court was unable to reconcile that relatively high "batting average" with the Respondent's contention that the actions were filed without regard to the merits.

The court of appeals also reversed the district court's award of Rule 11 sanctions. It held that although the plaintiffs were wrong in believing that they were required to replead the dismissed claims in order to preserve those issues for appeal, their basis for that belief was not frivolous.

B. Discussion

The complaint alleges that the Respondent violated Section 8(a)(1) by bringing a meritless suit against the Unions to enjoin them from engaging in protected concerted activity and to recover damages from them. Thus, our disposition of this case turns on the application of principles set forth in Bill Johnson's Restaurants.

In Bill Johnson's, the Supreme Court held that the Board may not enjoin the prosecution of a pending state court suit alleged to have been filed with a retaliatory motive unless the suit lacks a reasonable basis in fact and law.[19] While acknowledging the Board's strong interest in preventing interference with protected Section 7 rights, the Court said that this interest must be balanced against two countervailing

---

[19] 461 U.S. at 743. Exceptions to that principle, not relevant to this proceeding, are suits that are claimed to be beyond the jurisdiction of state courts because of federal preemption and suits that have objectives that are illegal under Federal law. Id. at 737-738 fn. 5.

interests: the First Amendment right of access to the courts and the States' interest in protecting the health and welfare of their citizens. Thus, if the state court suit has a reasonable basis, the Board may not issue an order directing that the suit be withdrawn, but rather must stay its hand and await the results of the state court adjudication with respect to the merits of the suit.[20]

On an entirely different footing, however, are suits that have been litigated to completion, for at that point the plaintiff has had his day in court and the state's interest in providing a forum for its citizens has been vindicated.[21] If the suit has resulted in judgment in favor of the plaintiff (the Respondent in the unfair labor practice case), then the unfair labor practice complaint must be dismissed, "for the filing of a meritorious law suit, even for a retaliatory motive, is not an unfair labor practice."[22] However, the Court said, if judgment has gone against the plaintiff, or the suit has been withdrawn or has been otherwise shown to be without merit, then the unfair labor practice proceeding may go forward. If the Board finds that the suit was filed with retaliatory intent, it may find a violation and order appropriate relief.[23] Moreover, the suit's having been found unmeritorious is a factor that the Board may take into account in determining whether it was filed in retaliation for the exercise of Section 7 rights.[24]

Notwithstanding the distinction clearly drawn by the Court between the standard that must be met to enjoin the prosecution of a pending lawsuit, and the standard that must be met to find an unfair labor practice once the lawsuit has

---

[20] Id. at 749
[21] Id. at 747.
[22] Id.
[23] Id. at 747, 749.
[24] Id. at 747.

been finally adjudicated, the Respondent argues that its suit cannot be deemed to lack merit if there was a reasonable basis for pursuing it. In support of this proposition, the Respondent cites the Supreme Court's holding in Professional Real Estate Investors that a suit cannot be deprived of antitrust immunity as a sham unless it is "objectively baseless."[25] We reject this contention. In Bill Johnson's, as we have stated, the Supreme Court held that the Board may not enjoin the prosecution of an allegedly retaliatory state court lawsuit unless the suit lacks a "reasonable basis." But once the suit has been adjudicated and the employer has lost, the Court continued, the Board may proceed to determine whether the suit was brought with retaliatory motive and thus violated the Act. The Board has interpreted that holding as meaning that, even if an employer had a "reasonable basis" for bringing the suit, the suit may still be found unlawful if the employer withdraws the suit or loses on the merits and the Board finds that it brought the suit out of a desire to retaliate against protected activity.[26] That principle squarely applies here.

The contention that Professional Real Estate Investors requires a different result has already been specifically rejected by the Ninth Circuit Court of Appeals. In Diamond Walnut Growers v. NLRB,[27] the court reaffirmed the distinction between pending suits, which can be enjoined

---

[25] Professional Real Estate Investors v. Columbia Pictures Industries, supra at 60.

[26] See, e.g., Machinists Local 91 (United Technologies), 298 NLRB 325, 326 (1990), enfd. 934 F.2d 1288 (2d Cir. 1991), cert. denied 502 U.S. 1091 (1992); Operating Engineers Local 520 (Alberici Construction), 309 NLRB 1199, 1200 (1992), enf. denied on other grounds 15 F.3d 677 (7th Cir. 1994); Summitville Tiles, 300 NLRB 64, 65 and fn. 6 (1990); Vanguard Tours, 300 NLRB 250, 255 (1990), enf. denied in relevant part 981 F.2d 62 (2d Cir. 1992).

[27] 53 F.3d 1085 (9th Cir. 1995).

only on a showing that they lack a reasonable basis, and suits that have been adjudicated adversely to the employer, which may be found unlawful if filed with retaliatory intent. The court held that Professional Real Estate Investors and similar cases did not alter the Supreme Court's approach to allegedly retaliatory lawsuits under Section 8(a)(1) as announced in Bill Johnson's. We agree with the court, and we reject the Respondent's suggestion that we revisit this settled area of the law.

Applying these principles to the circumstances of this case,[28] we note that the General Counsel issued the complaint in this case after the Respondent's suit had been adjudicated and its appeals had run their course. The issue here, therefore, is not whether the Respondent's suit lacked a reasonable basis, but whether it lacked merit (and, if it lacked merit, whether it was filed with a motive to retaliate against the Unions for engaging in protected conduct).

1. Did the Respondent's district court suit lack merit?

In deciding whether the suit lacked merit, we address first the question of the deference to be accorded in this proceeding to the federal courts' rulings on the merits of Respondent's suit.

The Supreme Court in Bill Johnson's treated the state court's final disposition of the state court suit as determinative on the

---

[28] Although Bill Johnson's involved a state court lawsuit, the Board has applied its principles to cases involving allegedly retaliatory federal court suits as well. See, e.g., Grinnell Fire Protection Systems Co., 328 NLRB No. 76 (1999); BASF Wyandotte Corp., 278 NLRB 173, 181 and n. 26 (1986). In applying those principles here, we note that the First Amendment right of access to the courts, which concerned the Court in Bill Johnson's, is implicated just as strongly when the lawsuit at issue is a federal court suit as it is when the suit at issue is a state court suit.

question of whether the suit was meritorious. Thus, the Court explained, if the employer prevails in the state court suit and obtains judgment against the employees, he should also prevail before the Board and the complaint should be dismissed, "for the filing of a meritorious law suit, even for a retaliatory motive, is not an unfair labor practice."[29] By the same token, however,

> [I]f judgment goes against the employer in the state court . . . or if his suit is withdrawn or is otherwise shown to be without merit, the employer has had its day in court, the interest of the State in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the . . . unfair labor practice case. The employer's suit having proved unmeritorious, the Board would be warranted in taking that fact into account in determining whether the suit had been filed in retaliation for the exercise of the employees' Sec. 7 rights.[30]

In this case, as we have noted, the Respondent sued in federal rather than state court, and its claims alleged violations of federal law rather than of state law. However, we see no reason not to regard the rulings of the federal courts here as equally determinative on the question of whether the Respondent's federal court lawsuit lacked merit for purposes of a Bill Johnson's analysis.

As antitrust law is primarily the concern of the federal courts and not of the Board, we do not hesitate to defer to the courts' determinations with regard to the merits of the antitrust claims in the Respondent's suit. We acknowledge that the Section 303 claims stand on somewhat different footing, inasmuch as they involve an issue over which the Board and the courts have concurrent jurisdiction: whether the Unions engaged in conduct which violates Section 8(b)(4) of the

[29] 461 U.S. at 747.

[30] Id. (emphasis added).

Act.[31] However, because the Respondent here elected to pursue its 8(b)(4) claims against the Unions in the form of a Section 303 suit in federal court rather than as an unfair labor practice charge before the Board, we think it appropriate to look to the federal courts' disposition of those claims as well as the antitrust claims as the test of whether the claims were meritorious.

a. The adjudicated claims. As we have discussed, the district court granted the Unions' motions for partial summary judgment and dismissed the Respondent's Section 303 claims based on the Unions' lobbying for passage and enforcement of the toxic waste ordinance, their prosecution of the Pile Drivers suit, and their institution of grievance and arbitration proceedings against ECI.[32] The court also granted partial summary judgment in favor of the Unions and dismissed the Respondent's antitrust claim, and the court of appeals affirmed, albeit on a different theory. Thus, with respect to those portions of the Respondent's suit that were actually adjudicated, the court rendered judgment for the Unions and against the Respondent. Accordingly, those portions of the

[31] Sec. 303 provides that

> (a) It shall be unlawful, for the purpose of this section only, . . . for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the . . . Act.
>
> (b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States . . . and shall recover the damages by him sustained and the cost of the suit.

[32] As noted above, the district court also struck a number of portions of the second amended complaint that were related to the claims as to which it granted partial summary judgment. We consider those stricken portions of the complaint to have been adjudicated as well as the claims themselves.

Respondent's suit were unmeritorious within the meaning of Bill Johnson's.

The Respondent contends, however, that its suit must be found meritorious. It argues that it actually prevailed, at least in part, because the court of appeals reversed the district court concerning both the standard to be applied in determining whether the Unions' actions lost their protection under the antitrust laws and the matter of sanctions. The Respondent also urges that its suit cannot be found to be without merit because it was not objectively baseless in the sense that no reasonable litigant could realistically expect to succeed on the merits.

We reject the Respondent's contentions as lacking in merit. The first, that the court of appeals' decision vindicated important aspects of the Respondent's claims, is bereft of either logical or factual support. All of the Respondent's claims that were litigated were dismissed: judgment was entered against the Respondent and in favor of the Unions; and the Unions were awarded costs as the prevailing parties.[33] That the court of appeals agreed with the Respondent concerning certain aspects of antitrust law is beside the point, as is its holding that the Unions might have been guilty of antitrust violations had they, in fact, engaged in a pattern of suit-filing without regard to the merits. The point is that the Respondent alleged that the Unions had violated the antitrust laws by engaging in such a pattern of conduct, and the court found that they had not. That it reached that conclusion on a different theory from that of the district court is irrelevant.

The Respondent also argues that it prevailed in part because the court of appeals' ruling will dissuade the Unions from engaging in unlawful conduct in the future. That argument,

---

[33] Rule 54(d), Fed. R. Civ. P., provides for the award of costs to the prevailing party in a civil action.

however, is both speculative and irrelevant to the issue of which party prevailed in the district court action. To "prevail" in litigation, a party must do more than obtain a ruling from the court as to what the law is. The party must also persuade the court that the law, as applied to the facts in the case, compels judgment in its favor on at least some point.[34] In that respect, the Respondent failed at every turn.

Equally unavailing is the Respondent's contention that it "prevailed" in part because the court of appeals reversed the district court's award of sanctions. The court in no sense endorsed the merits of the Respondent's suit. Indeed, its ruling in this regard concerned only the consequences to the Respondent of pursuing an unmeritorious suit. The court simply found that, having lost on the merits regarding certain of its claims, the Respondent did not act frivolously by repleading those claims in the belief that it had to do so in order to preserve those issues for appeal. In no way can this ruling on a procedural issue be read as supporting the Respondent's present contention that its suit had substantive merit.

b. The voluntarily dismissed claims. Not all the Respondent's claims were submitted to the courts for a decision on the merits. Some, alleging (inter alia) unlawful picketing, encouraging employees to engage in secondary strikes, and violence, were voluntarily withdrawn and dismissed with prejudice.

---

[34] See City of Chanute, Kansas v. Williams Natural Gas Co., 31 F.3d 1041, 1048-1049 (10th Cir. 1994), cert. denied 513 U.S. 1191 (1995) (cities were not "substantially prevailing parties" for purposes of Clayton Act, despite district court's having originally granted preliminary injunction against pipeline and cities' having later entered into stipulation agreement with pipelines granting certain rights to cities, where cities' antitrust damage claims were fully adjudicated on the merits and rejected.)

In Bill Johnson's, the Supreme Court indicated that the withdrawal of a claim could be regarded as equivalent to an showing that it lacks merit:

> If judgment goes against the employer in the state court, however, or if his suit is withdrawn or is otherwise shown to be without merit, the employer has had its day in court, the interest of the state in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the ... unfair labor practice case.[35]

Further, under Rule 41 of the Federal Rules of Civil Procedure, dismissal of a complaint with prejudice at the plaintiff's request acts as a complete adjudication. Unless otherwise provided for by the court, such a dismissal is subject to the rules of res judicata and is binding on the parties and their privies.[36] Accordingly we find that these claims that the Respondent voluntarily withdrew with prejudice were, for Bill Johnson's purposes, unmeritorious.[37]

2. Was the Unions' conduct protected by Section 7?

---

[35] 461 U.S. at 747 (emphasis added).

[36] Wright and Miller, Federal Practice and Procedure, Civil 2d, Secs. 2364, 2367, 2373.

[37] In Vanguard Tours, 300 NLRB at 255, the Board declined to read the Supreme Court's statement in Bill Johnson's as suggesting that the withdrawal of a lawsuit is in all circumstances equivalent to a showing of lack of merit. The Board found, under the circumstances presented in Vanguard Tours, that the employer's withdrawal of its suit was presumptively an admission that the suit lacked merit, and that the employer had failed to rebut the presumption. In Vanguard Tours, however, unlike this case, there was no indication that the employer had withdrawn its suit with prejudice. We find the employer's voluntary withdrawal of its claim with prejudice to be an admission that the claims lacked merit.

Although the courts dismissed most of the Respondent's claims against the Unions, the fact that those claims were dismissed does not in and of itself mean that the Unions' actions were necessarily protected by Section 7. Some kinds of lawful concerted conduct do not enjoy the protection of the Act.[38] Before we can determine whether the Respondent's suit violated the Act, then, we must determine whether the Unions' actions were affirmatively protected by Section 7.

Can union conduct ever be protected?

The Respondent contends that the conduct in question was unprotected because it was engaged in by the Unions, rather than by employees. The Respondent's premise is that only employees-not unions-have Section 7 rights, and thus that its suit could not violate Section 8(a)(1) because it was not in retaliation against employee protected activity. The Respondent relies on Lechmere, Inc. v. NLRB,[39] in which the Supreme Court stated that "the NLRA confers rights only on employees, not on unions or their nonemployee organizers."[40] The Respondent also reasons that, because the Unions did not represent its employees, their actions were unprotected. We find no merit to either contention.

To begin with, we do not read the Supreme Court's language quoted above in as sweeping a fashion as the Respondent urges. Lechmere was concerned with one narrow aspect of union activity-the attempt by union organizers who were not employees of the respondent employer to engage in

---

[38] E.g., NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard Broadcasting), 346 U.S. 464 (1953) (disloyally disparaging employer's product).

[39] 502 U.S. 527 (1992).

[40] Id. at 532 (emphasis in original).

organizing activity on that employer's private property. The Court reaffirmed its earlier holding in NLRB v. Babcock & Wilcox Co.,[41] which distinguished between the Section 7 right of employees of the employer to engage in self-organizational activity on the employer's property and the (much more restricted) right of nonemployee organizers, to whom the Court held that Section 7 applies "only derivatively," to engage in trespassory activities on the same property.[42] The Court noted its holding in Babcock that an employer may have to allow nonemployee organizers on its property if the union has no reasonable alternative means of reaching the employees with its message.[43] The Court also did not question the exception to the general rule set forth in Babcock & Wilcox that an employer may not discriminate against unions in denying access to its property.[44] In our view, the Court's reaffirmance in Lechmere of the right of nonemployee union organizers to gain access to an employer's property if no reasonable alternative means of reaching the employees exist, together with its failure to question the proposition that employers may not discriminatorily deny unions access to their property, negate any suggestion that the Court intended to hold that union conduct is never protected by the Act.

Our confidence in this reading of Lechmere is bolstered by the language and purpose of the Act itself. Section 1 sets forth the Act's raison d'etre:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by

[41] 351 U.S. 105 (1956).
[42] 502 U.S. at 533.
[43] 502 U.S. at 533-534, citing Babcock, 351 U.S. at 112.
[44] 351 U.S. at 112.

protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

To those ends, Section 7 provides that

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]

The Act thus unequivocally assures employees of the right to join unions and to engage in "other concerted activities" for "other mutual aid or protection." It would be a curious and myopic reading of these core provisions of the Act to hold that, although employees are free to join unions and to work through unions for purposes of "other mutual aid or protection," the conduct of the unions they form and join for those purposes is not protected by the Act. Under that reasoning, conduct that is protected when engaged in by two or more employees together would lose its protection if engaged in by the employees' union on their behalf. We decline the Respondent's invitation to read the Act in such a perverse way.

The Respondent's contention is also contrary to Board and court precedent. In Diamond Walnut Growers,[45] both the Board and the court of appeals found that the employer violated Section 8(a)(1) by bringing a meritless libel suit against the union with retaliatory motive. The employer argued that it could not have violated Section 8(a)(1) because it sued only the union, not individual employees. Both the Board and the court squarely rejected that argument. The

[45] 312 NLRB 61 (1993), enfd. 53 F.3d 1085 (9th Cir. 1995).

Board affirmed the decision of the administrative law judge, who held that "for the Board to find an unfair labor practice pursuant to a Bill Johnson's Restaurants analysis, it is not necessary for the plaintiff/respondent to sue employees in state court nor to sue a union and employees. It is sufficient to sue a union only as in this case."[46]

Likewise, in Dahl Fish Co.,[47] the Board adopted the administrative law judge's finding that the employer violated Section 8(a)(1) by filing suit against the union in retaliation for the union's filing a Board charge. The judge specifically found the acts of the union and its agents protected in those circumstances. A contrary holding, she reasoned, would abrogate the advantages of concerted activity the Act was designed to protect by imposing on the employees the burden of filing charges to gain such protection. The employees would then be subjected to the dangers of lawsuits with their attendant costs, which could convince them to forgo their Section 7 rights to file charges. Thus, I find that the Union is protected by Section 8(a)(1) in these circumstances. To hold otherwise would destroy the equilibrium the Act was designed to establish, and would divest the employees of the advantages gained by their decision to organize and to be represented by the single voice of the Union.[48]

The identical reasoning applies here.[49]

---

[46] 312 NLRB at 69 (emphasis added).

[47] 279 NLRB 1084, 1110-1111 (1986), enfd. mem. 813 F.2d 1254 (D.C. Cir. 1987).

[48] 279 NLRB at 1111.

[49] See also Geske & Sons, Inc. v. NLRB, 103 F.3d 1366, 1377 (7th Cir. 1997).

The Respondent argues, however, that Diamond Walnut is distinguishable because there the union represented the employees of the employer who filed the suit, and because those employees were engaged in a strike. The Respondent notes that the court of appeals found that the suit drained the union's resources and inevitably interfered with the employees' exercise of their Section 7 right to strike. Because its employees were not represented by the Unions and did not engage in a strike or other protected activity, the Respondent contends that its suit did not interfere with their exercise of Section 7 rights, and therefore was not unlawful.

We disagree. Although the employers in Diamond Walnut and Dahl Fish sued the unions that represented their employees and that were helping those employees to exercise their Section 7 rights, those are not the only circumstances in which an employer's suit against a union may interfere with the exercise of employees' rights. In the first place, employees of employers other than the Respondent have Section 7 rights, and some of them form or join unions in order to advance those rights. Even if those individuals' interests are not congruent with, or are even antithetical to, the interests of the Respondent's employees, their concerted pursuit of those interests, through unions or otherwise, is protected by Section 7 except under circumstances not shown to exist here. And the Respondent cannot lawfully interfere with those employees' exercise of their Section 7 rights merely because it does not employ them. It is well established that an employer violates the Act by interfering with the exercise of Section 7 rights of employees of other employers, or by causing other employers to discriminate against their employees because of their union or other protected concerted activities.[50] Thus, assuming that the

---

[50] See, e.g., Dews Construction Corp., 231 NLRB 182 fn. 4 (1977), enfd. mem. 578 F.2d 1374 (3d Cir. 1978); International Shipping Assn., 297 NLRB 1059 (1990).

actions of the Unions on behalf of the employees they represented were otherwise protected, they did not lose their protected character vis-à-vis the Respondent merely because the employees represented by the Unions were not the Respondent's employees. As the Supreme Court noted in Eastex, Inc. v. NLRB,[51] the employees whose concerted activities may be protected under Section 7 are defined by Section 2(3) to include any employees, not just those of any particular employer.[52]

For all the foregoing reasons, we find that the Respondent's suit is not immune from Section 8(a)(1) liability merely because it was filed against the Unions, rather than against employees, or because the Unions did not represent the Respondent's employees.

Was the Unions' Actual Conduct Protected?

The Respondent also contends that, whether or not union activity in the abstract can be protected by Section 7, the Unions' conduct here was not protected. The Respondent relies in part on a complaint (later settled) against Cement Masons Local 825, alleging violence and rioting that assertedly was part of the conduct alleged to be unlawful in the Respondent's suit.[53] It also cites a General Counsel's advice memorandum which analyzed assertedly

---

[51] 437 U.S. 556 (1978).

[52] Id. at 564. See also O'Neil's Markets v. NLRB, 95 F.3d 733 (1996), in which the court of appeals, citing Eastex, agreed with the Board that union area standards handbilling is protected by Sec. 7. See Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180, 206 fn. 42 (1978).

[53] Case 32-CB-2787.

indistinguishable conduct in a different case by another union and found it unprotected.[54]

a. The adjudicated claims. We consider first the conduct that was the subject of the Respondent's claims that were dismissed on the merits by the district court--i.e., the Unions' legislative lobbying, suit filing, and instituting grievance and arbitration proceedings. We note initially that each of those courses of action concerned conditions of employment, and thus normally would be protected by Section 7 if engaged in by employees.[55] Because concerted activity is not unprotected simply because it is engaged in by unions, we find that those actions on the part of the Unions were presumptively protected.

The Respondent argues that the Unions' conduct was unprotected because it was engaged in with an unlawful secondary objective. The Respondent brought the identical

---

[54] Tame T.I.C., Cases 27-CC-826 et al.

We reject at the outset the Respondent's contention that either the issuance of a complaint against Cement Masons Local 825 or the advice memorandum in Tame T.I.C. compels a finding that any of the Unions' alleged conduct was unprotected. Neither action by the General Counsel constituted a decision on the merits.

[55] In Eastex, the Supreme Court held that Sec. 7 protects employees who seek to improve working conditions by resorting to administrative and judicial fora, and who appeal to legislators to protect their interests as employees. 437 U.S. at 566. See also e.g., Summitville Tiles, 300 NLRB at 65 (suits filed by employees found protected); Altex Ready Mixed Concrete, 223 NLRB 696, 700 (1976), enfd. 542 F.2d 295 (5th Cir. 1976) (union filing suit against employer for contract violation, protected); Kaiser Engineers v. NLRB, 538 F.2d 1379, 1384-1385 (9th Cir. 1976) (lobbying U.S. senators and congressmen concerning immigration laws, protected) (Wray Electric Contracting, 210 NLRB 757, 762 (filing OSHA complaint found protected); Miami Systems Corp., 320 NLRB 71, 77 (1995), revd. in part on other grounds 111 F.3d 1284 (6th Cir. 1997) (pursuing grievance to arbitration, protected).

claims to the district court, however, and lost. The court rejected the Respondent's contention that each of those actions violated Section 8(b)(4) and dismissed its claims based on those contentions. The Respondent did not appeal the dismissals. As we have observed, it is possible for conduct to be lawful but not protected by Section 7. But the Respondent argued to the court that the Unions' conduct was unlawful for the same reason it now argues that that conduct was unprotected-i.e., because it allegedly had an unlawful secondary object. Having litigated this very issue unsuccessfully before the courts, and having failed to file a charge with the Board, the Respondent will not now be heard to argue that the Unions' conduct was unprotected.

We note in particular that the district court held that the Unions' filing and processing of meritorious grievances to enforce lawful contract provisions could not violate Section 8(b)(4).[56] The court cited Truck Drivers Union Local 705 v. NLRB,[57] in which the D.C. Circuit, in reaching that result, disagreed with the Board. The Board had held that, assuming that Bill Johnson's applies to grievance processing, even the processing of a meritorious grievance could violate Section 8(b)(4) if done with a secondary objective.[58] The Board has since indicated, however, in agreement with the D.C. Circuit,

---

[56] It also held that the Unions' lobbying activities did not run afoul of Sec. 8(b)(4). Its decision was cited with evident approval in Brown & Root v. Louisiana State AFL-CIO, 10 F.3d 316 (1994), in which the Fifth Circuit clearly indicated that to find governmental lobbying to constitute "coercion" within the meaning of Sec. 8(b)(4)(B) would pose potentially serious First Amendment problems.

[57] 820 F.2d 448 (1987).

[58] Teamsters Local 705 (Emery Air Freight), 278 NLRB 1303, 1304 (1986). The Board held that the union's grievance in that case had an unlawful secondary objective and therefore came within the exception mentioned in fn. 5 of Bill Johnson's for suits filed with an unlawful objective.

that the processing of a meritorious grievance does not violate Section 8(b)(4) unless the grievance seeks to enforce an unlawful contract clause, and has endorsed the court's distinction between illegal objective and retaliatory motive.[59]

Because it failed to convince the court that the Unions' lobbying, suit filing, or grievance processing violated either Section 8(b)(4) or the antitrust laws, and has suggested no other reason why that otherwise protected conduct should be found to have lost its protected character, we find that the Respondent has failed to rebut the presumption that the Unions' conduct was protected.[60]

b. The voluntarily dismissed claims. The Respondent also contends that the Unions engaged, in unprotected acts of picketing, handbilling, violence, and other conduct that was

---

[59] See Elevator Constructors (Long Elevator), 289 NLRB 1095 (1988), enfd. 902 F.2d 1297 (8th Cir. 1990), citing the D.C. Circuit's decision in Truck Drivers Union Local 705, supra; Teamsters Local 776 (Rite Aid), 305 NLRB 832 (1991), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993).

[60] Contrary to the General Counsel and the Unions, we find that the Respondent is not barred by Sec. 10(b) of the Act from contending that the Unions' conduct was unprotected. Sec. 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge[.]" That provision has been interpreted by the Board also to preclude raising, as a defense to a complaint allegation, conduct as to which Sec. 10(b) would bar a complaint if it were alleged as an unfair labor practice. See, e.g., Sewell-Allen Big Star, 294 NLRB 312, 313 (1989), enfd. mem. 943 F.2d 52 (6th Cir. 1991), cert. denied 504 U.S. 909 (1992). We find that principle inapplicable in the kind of Bill Johnson's setting presented here, where the General Counsel, in establishing a violation of Sec. 8(a)(1), must show that the Unions' allegedly secondary activity, which occurred outside the 10(b) period, was protected. Because of this required showing, the Respondent cannot be precluded from asserting facts otherwise barred by 10(b) in countering the General Counsel's case.

not addressed on the merits by the court, but was the subject of claims that were voluntarily dismissed with prejudice at the Respondent's request. Thus, the court made no findings as to whether the Unions engaged in the conduct alleged and, if so, whether the conduct was lawful.

We find it unnecessary to decide whether those alleged actions, if engaged in, were protected. We have already found that the Unions' lobbying, grievance filing and processing, and lawsuit filing were protected activities. If, then, the Respondent filed its suit in an attempt to retaliate against the Unions for engaging in those protected actions, and the suit was unmeritorious, the suit was unlawful, regardless of whether it was also targeted at activities that were not protected. Accordingly, in our view, whether the conduct alleged in the voluntarily dismissed claims was or was not protected by Section 7 is irrelevant.

3. Was the Respondent's lawsuit unlawfully motivated?

For the reasons discussed above, we have found that the Respondent's suit lacked merit and that the Unions' conduct that was the target of the suit was protected by Section 7. In order to find that the Respondent violated Section 8(a)(1), however, we must find that it either filed or maintained its suit against the Unions in retaliation against protected conduct. We find, on the basis of the following evidence, that the Respondent's suit had a retaliatory motive.

First, the Respondent's suit was, by its terms, directed at protected conduct. The complaint allegations in that action expressly listed lobbying, suit filing, and grievance filing as purportedly unlawful. As we have found, each of those forms of conduct was protected. Since the suit was aimed directly at protected activity, and necessarily tended to discourage similar protected activity, it was, by definition, retaliatory

within the meaning of Bill Johnson's.[61] Indeed, the Respondent as much as admits a retaliatory motive. In its answering brief, the Respondent states that it "filed its litigation in order to stop certain Union conduct which it believed to be unprotected by the Act, and that after the suit, the activity stopped." Clearer evidence of retaliatory motive could hardly be found.[62]

Moreover, in alleging that the Piledrivers suit was unlawful, the Respondent charged not only the Unions that were parties to that suit but also some that were not. The district court sensibly ruled that "[t]he non-party defendants cannot be held liable for a[n] action based on the filing of a lawsuit to which they were not parties," and dismissed the suit against the nonparty unions. This pursuit of an action against several unions that were not even parties to the Piledrivers litigation indicates that the Respondent was interested only in harassing the Unions, not in obtaining justice, and is additional evidence that it filed and maintained its suit with a retaliatory motive.

The reception the Respondent's suit received at the hands of the federal courts is still further evidence of retaliatory motive. The Supreme Court in Bill Johnson's held that, when

---

[61] H.W. [illegible]rss Co., 296 NLRB 1286, 1287 (1989); Phoenix Newspapers, 294 NLRB 47, 50 (1989).

[62] In his affidavit, the Respondent's counsel avers that the Respondent filed its suit against the Unions to preserve its business from what it reasonably believed to be unlawful activities by the Unions. The courts, however, found that most of the Unions' activities were not unlawful and dismissed with prejudice the claims concerning the remaining activities. The Respondent's mistaken belief that the Unions' actions were unlawful, even assuming that it had a reasonable basis and was held in good faith, is not a defense to a finding that its suit was unlawful if, as we find, the suit lacked merit and was filed with a retaliatory motive. See Phoenix Newspapers, 294 NLRB at 49-50.

an employer's suit is found unmeritorious, "the Board would be warranted in taking that fact into account in determining whether the suit had been filed in retaliation for the exercise of the employees' Section 7 rights."[63] We do so here and find that the utter absence of merit to the Respondent's Section 303 claims that were dismissed on motions for summary judgement indicates a retaliatory motive on the part of the Respondent which brought them.

4. Are portions of the complaint barred by Section 10(b)?

The charges filed by all the Unions except Steamfitters Local 342 and IBEW Local 302 were filed on May 20, 1992, more than four years after the Respondent initiated its civil suit. The Respondent contends that the complaint allegations based on the 1992 charges were untimely filed under Section 10(b).

We find no merit in that contention. The Board has held that the General Counsel may add allegations to the complaint outside the 6-month 10(b) period if they are closely related to the allegations of a timely filed charge and are based on conduct that occurred during the 10(b) period.[64] Allegations are "closely related" if (1) they arise from the same factual situation as those of the timely filed charge, (2) they involve the same legal theory, and usually the same section of the Act, and (3) the respondent would raise the same or similar defenses to both allegations.[65]

The Respondent concedes that the charges filed in 1988 by Steamfitters Local 342 and IBEW Local 302 were timely filed. And we find that the allegations of the 1992 charges are closely related to the earlier charges. Thus, both sets of

[63] 461 U.S. at 747.
[64] Redd-I, Inc., 290 NLRB 1115, 1116 (1988).
[65] Id. at 1118.

charges arise from the same factual situation (the Respondent's lawsuit against all the Unions), involve the same legal theory (a violation of Section 8(a)(1) under Bill Johnson's), and have elicited identical defenses from the Respondent. As the 1992 charges were based on conduct that took place during the 10(b) period, we find that the allegations based on those charges are not time-barred.[66]

C. Conclusions of Law

For all the reasons discussed above, we find that the Respondent's lawsuit against the Unions lacked merit, that the Unions' conduct that was the target of the suit was protected by Section 7, and that the Respondent filed and maintained its suit out of a desire to retaliate against the unions for engaging in protected concerted activity. We therefore find that the suit violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, we shall order that it cease and desist and take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to reimburse the Unions for all legal and other expenses, including attorneys' fees, incurred in defending against the Respondent's lawsuit, with interest as computed in New Horizons for the Retarded, 283 NLRB 1173 (1987), and Teamsters Local 776 (Rite Aid Corp.), 305 NLRB 832, 835-836 and fn. 10 (1991), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993).

[66] We therefore need not address the Unions' contention that the allegations based on the 1992 charges are not barred by Sec. 10(b) because the Unions were not aware that the Respondent's suit lacked merit until the district court dismissed it.

Concerning the award of attorneys' fees, we note that the Board has consistently found it appropriate to order employers to reimburse both employees and unions for legal expenses, including attorneys' fees, incurred in defending unlawful suits by employers.[67] Indeed, the Supreme Court in Bill Johnson's expressly stated: "If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses."[68]

The Respondent contends, however, that an award of attorneys' fees to the Unions is foreclosed in this case. It argues that the Court in Bill Johnson's authorized such awards only for employees, not for unions. It also contends that attorneys' fees may be awarded in Board cases only to discourage frivolous litigation, and that its suit, even if unmeritorious, was not frivolous.[69] We find neither argument persuasive.

Although the Respondent correctly points out that the Supreme Court in Bill Johnson's expressly endorsed awards of attorneys' fees only to employees, we believe that the reason was that the Court was addressing only the case before it, in which the employer had sued employees, not a union. We find nothing in the Court's opinion to suggest that its reasoning was meant to apply only to suits against

---

[67] See, e.g., Diamond Walnut Growers, 312 NLRB at 71; Geske & Sons, Inc., 317 NLRB 28, 30, 58-59 (1995), enfd. 103 F.3d 1366, 1378-1379 (7th Cir. 1997); Phoenix Newspapers, 294 NLRB at 51; H.W. Barss Co., 296 NLRB at 1288; Summitville Tiles, 300 NLRB at 67.

[68] 461 U.S. at 747.

[69] The Respondent relies on the Sixth Circuit's decision in Johnson & Hardin Co. v. NLRB, 49 F.3d 237 (1995), in which the court of appeals relied on both of those theories in denying enforcement to pertinent provisions of the Board's order. With all due respect to the court, we disagree with its decision for the reasons discussed in text below.

employees and, like the Seventh Circuit, we decline to draw by negative implication the inference urged by the Respondent.[70] Rather, we agree with the Seventh Circuit's observations in the course of affirming an award of legal expenses:

> The injured party, the Union that plays a necessary part in the organizational activities of the employees, is compensated for expenses that it would not have incurred in the absence of the baseless state law suit. An adequate deterrent to unlawful attempts by employers to hinder organizational attempts by unions is provided. A baseless and retaliatory lawsuit against a union can be a powerful weapon in the hands of an unprincipled employer. Such an employer need not win its lawsuit against a union to thwart the Union's attempts to organize workers; rather, the employer need only impose substantial costs and delays upon the Union. The Board's remedies in the face of such a potential abuse must include an economic disincentive for engaging in such conduct.[71]

The Respondent's argument that it is inappropriate to award attorneys' fees unless a party has engaged in frivolous litigation is also wide of the mark. We do not award attorneys' fees in Bill Johnson's cases because employers' suits are frivolous. We award them because the suits are unlawful; they themselves constitute the unfair labor practices for which a remedy must be provided.[72] As the

---

[70] Geske & Sons, Inc. v. NLRB, 103 F. 3d at 1378.

[71] Id. at 1379.

[72] See SEIU Local 32B-32J v. NLRB, 68 F.3d 490, 496 (D.C. Cir. 1995) (enforcing Board's award of attorneys' fees against union that violated Sec. 8(b)(4)(B) by unlawfully demanding arbitration). Lang Towing, Inc., 201 NLRB 629 (1973), and Tiidee Products, Inc., 194 NLRB 1234 (1972), enfd. as modified sub nom. Electrical, Radio & Machine Workers v. NLRB, 502 F.2d 349 (D.C. Cir. 1974), cert. denied 417 U.S. 921 (1974), cited by the Respondent, are inapposite to this case. Neither of those decisions involved lawsuits that themselves violated the Act.

court of appeals correctly observed in Geske & Sons, the Unions would not have incurred those attorneys' fees except for the Respondent's meritless lawsuit, and it is both appropriate and necessary to order that they be made whole and to provide an economic disincentive for engaging in similar unlawful conduct.

ORDER

The National Labor Relations Board orders that the Respondent, BE & K Construction Company, Birmingham, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Filing and prosecuting lawsuits with causes of action against the Unions that are without legal merit and that are motivated to retaliate against activity protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reimburse the Unions for all legal and other expenses incurred in the defense of the Respondent's lawsuit in the manner set forth in the Remedy section of this decision.

(b) Within 14 days after service by the Region, post at its facilities in Birmingham, Alabama and Contra Costa County, California copies of the attached notice marked "Appendix."[73] Copies of the notice, on forms provided by the

---

[73] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 21, 1987.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the Respondent's cross-motion for summary judgment is denied.

Dated, Washington, D.C. September 30, 1999

John C. Truesdale, Chairman

Sarah M. Fox, Member

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT file and prosecute lawsuits with causes of action against the Unions that are without legal merit and that are motivated to retaliate against activity protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reimburse the Unions for all legal and other expenses incurred in the defense of our lawsuit, with interest.

BE & K CONSTRUCTION COMPANY

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, First Amendment

Congress shall make no law … abridging the … right of the people … to petition the Government for a redress of grievances.

29 U.S.C. § 157 Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership ina labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;….

(b) Unfair labor practices by a labor organization

It shall be an unfair labor practice for a labor organization or its agents –

(4)(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is –

* * *

(B) forcing or requiring any person to cease using selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title ….

29 U.S.C. § 160 Prevention of unfair labor practices

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter ….

29 U.S.C. § 187 **Unlawful activities or conduct; right to sue; jurisdiction; limitations; damages**

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

Supreme Court, U.S.
FILED
NOV 5 2001
CLERK

(2)

No. 01-518

In the Supreme Court of the United States

BE&K CONSTRUCTION COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

ARTHUR F. ROSENFELD
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board (Board) reasonably concluded that petitioner committed an unfair labor practice, in violation of 29 U.S.C. 157 and 158(a)(1), by prosecuting a retaliatory and unmeritorious lawsuit against labor unions.

2. Whether the Board acted within its authority in ordering petitioner, as a remedy for the unfair labor practice, to reimburse the unions for attorney's fees they incurred in defending against petitioner's suit.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Bill Johnson's Restaurants, Inc. v. *NLRB*, 461 U.S.731 (1983)	*passim*
Diamond Walnut Growers, Inc. v. *NLRB*, 53 F.3d 1085 (9th Cir. 1995)	15, 16, 18
Eastex, Inc. v. *NLRB*, 437 U.S. 556 (1978)	15
Geske & Sons, Inc. v. *NLRB*, 103 F.3d 1366 (7th Cir.), cert. denied, 522 U.S. 808 (1997)	15
Johnson & Hardin Co. v. *NLRB*, 49 F.3d 237 (6th Cir. 1995)	16, 19
Lechmere, Inc. v. *NLRB*, 502 U.S. 527 (1992)	7, 14
NLRB v. *Gissel Packing Co.*, 395 U.S. 575 (1969)	13
NLRB v. *International Union of Operating Eng'rs, Local 520*, 15 F.3d 677 (7th Cir. 1994)	17, 18
NLRB v. *Vanguard Tours, Inc.*, 981 F.2d 62 (2d Cir. 1992)	11
Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. *Austin*, 418 U.S. 264 (1974)	14-15
O'Neil's Markets v. *United Food & Commercial Workers' Union, Meatcutters Local 88*, 95 F.3d 733 (8th Cir. 1996)	15
Petrochem Insulation, Inc. v. *NLRB*, 240 F.3d 26 (D.C. Cir. 2001), cert. denied, No. 01-92 (Oct. 29, 2001)	9, 11, 12, 18

Cases—Continued: Page

Professional Real Estate Investors, Inc. v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993) 8, 10, 13
Summit Valley Indus., Inc. v. *Local 112, United Brotherhood of Carpenters*, 456 U.S. 717 (1982) 19
USS-POSCO Indus. v. *Contra Costa County Bldg. & Constr. Trades Council*:
692 F. Supp. 1166 (N.D. Cal. 1988) 3, 12
721 F. Supp. 239 (N.D. Cal. 1989) 4, 6, 12
31 F.3d 800 (9th Cir. 1994) 4, 5, 12, 19
White v. *Lee*, 227 F.3d 1214 (9th Cir. 2000) 11, 13
Wisniewski v. *United States*, 353 U.S. 901 (1957) 16, 19

Statutes and rule:

Labor-Management Relations Act, 1947, § 303, 29 U.S.C. 187 ..... 3, 6, 12, 19
National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 2(3), 29 U.S.C. 152(3) 14
§ 7, 29 U.S.C. 157 ..... 2, 5, 7, 9, 13, 14, 15, 16, 17
§ 8(a)(1), 29 U.S.C. 158(a)(1) 2, 5, 7, 14, 16
§ 8(b)(4), 29 U.S.C. 158(b)(4) 3
§ 10(c), 29 U.S.C. 160(c) 2
Sherman Act, 15 U.S.C. 1 *et seq.*:
§ 1, 15 U.S.C. 1 4
§ 2, 15 U.S.C. 2 4
§ 15(a), 15 U.S.C. 15(a) 13
Fed. R. Civ. P. 11 ..... 4, 5, 19

In the Supreme Court of the United States

No. 01-518

BE&K CONSTRUCTION COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 246 F.3d 619. The decision and order of the National Labor Relations Board (Pet. App. 28a-68a) are reported at 329 N.L.R.B. 717.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 2001. A petition for rehearing was denied on June 28, 2001 (Pet. App. 26a-27a). The petition for a writ of certiorari was filed on September 25, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(a)(1) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the Act, 29 U.S.C. 157. The rights guaranteed in Section 7 include the right to engage in concerted activity "for the purpose of * * * mutual aid or protection." 29 U.S.C. 157.

This Court held in *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983), that it is an unfair labor practice for an employer "to prosecute an unmeritorious lawsuit for a retaliatory purpose," but "the offense is not enjoinable unless the suit lacks a reasonable basis." *Id.* at 749. Thus, the National Labor Relations Board (Board) may not halt the prosecution of a suit unless the suit lacks a reasonable basis in fact or law. *Id.* at 748. But "[i]f judgment goes against the employer * * * or if his suit is withdrawn or is otherwise shown to be without merit," and if the Board determines that the suit was filed in retaliation for the exercise of employees' Section 7 rights, then the Board may find that the lawsuit violated Section 8(a)(1) of the Act. *Id.* at 747. The Board, moreover, may consider the suit's lack of merit in determining whether the suit was filed in retaliation for the exercise of Section 7 rights. *Ibid.* If the Board finds a violation, it may order any proper relief that would effectuate the policies of the Act, including ordering the employer to reimburse the employees for their attorney's fees and other expenses of defending against the wrongful suit. *Ibid.* (citing § 10(c), 29 U.S.C. 160(c)).

2. Petitioner is an industrial general contractor. Pet. App. 4a, 32a. Petitioner's employees are not unionized. *Id.* at 4a, 33a. In late 1986 or early 1987, USS-POSCO Industries (USS-POSCO) awarded petitioner a contract to modernize a steel mill in Pittsburg, California. Petitioner formed a joint venture with Eichleay Constructors, Inc. (Eichleay) to perform the contract. *Ibid.*

In September 1987, petitioner and USS-POSCO filed a complaint in the United States District Court for the Northern District of California against a number of construction-industry unions. Pet. App. 4a, 33a. The complaint sought damages under Section 303 of the Labor-Management Relations Act, 1947, 29 U.S.C. 187, based on allegations that the unions violated Section 8(b)(4) of the NLRA, 29 U.S.C. 158(b)(4), by supporting a new county ordinance addressing toxic waste emissions in an effort to delay the Pittsburg project; by bringing contractual grievances against Eichleay; by picketing and handbilling at petitioner's and USS-POSCO's premises; and by filing a lawsuit in state court, which alleged among other things that petitioner and USS-POSCO had violated California's Health and Safety Code. Pet. App. 4a-5a, 34a; see *USS-POSCO Indus.* v. *Contra Costa County Bldg. & Constr. Trades Council*, 692 F. Supp. 1166 (N.D. Cal. 1988).

In July 1988, the district court granted in part the unions' motions for partial summary judgment and dismissed all claims relating to the unions' lobbying and initiation of contractual grievances. Pet. App. 5a-6a, 34a-35a; see *USS-POSCO*, 692 F. Supp. at 1168-1170. The court declined to grant the unions summary judgment on the claim relating to their state-court suit, and it permitted further discovery on that claim. Pet. App. 6a, 35a; see 692 F. Supp. at 1170.

Petitioner and USS-POSCO filed an amended complaint which realleged claims similar to those on which

the district court had granted summary judgment in favor of the unions. The amended complaint also added a new claim for treble damages under Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2. Pet. App. 6a, 35a. In May 1989, the district court denied petitioner and USS-POSCO leave to re-allege their lobbying and grievance claims and granted the unions summary judgment on the claim that arose from the unions' state-court suit. *Id.* at 6a, 36a-37a; see *USS-POSCO Indus.* v. *Contra Costa County Bldg. & Constr. Trades Council*, 721 F. Supp. 239 (N.D. Cal. 1989). The district court allowed petitioner and USS-POSCO to file a revised amended complaint that reflected its rulings. *Id.* at 242.

Petitioner and USS-POSCO filed a second amended complaint which realleged all the claims that the district court had already resolved in favor of the defendant unions, as well as claims that had not been dismissed. Pet. App. 7a, 37a. The court struck the previously dismissed claims and imposed sanctions on petitioner and USS-POSCO pursuant to Fed. R. Civ. P. 11 for continuing to replead those claims. Pet. App. 7a, 38a. USS-POSCO then dismissed all of its remaining claims with prejudice. *Ibid.* Petitioner, however, continued to pursue its remaining claims. In September 1991, the district court granted summary judgment in favor of the unions on petitioner's antitrust claim. *Id.* at 8a, 39a. Petitioner then voluntarily dismissed, with prejudice, its remaining claims under the Labor-Management Relations Act. *Ibid.*

Petitioner appealed the district court's dismissal of its antitrust claims, and the United States Court of Appeals for the Ninth Circuit affirmed. Pet. App. 9a, 39a & n.17; see *USS-POSCO Indus.* v. *Contra Costa County Bldg. & Constr. Trades Council*, 31 F.3d 800 (9th Cir. 1994). Although the court of appeals did not

agree with the district court's grounds for dismissing the antitrust claims, it held that the unions' alleged antitrust violations were within the scope of the *Noerr-Pennington* doctrine of antitrust immunity, and thus the unions were protected against liability. See Pet. App. 8a-9a, 40a-41a. In the course of rejecting petitioner's claim that the *Noerr-Pennington* doctrine was inapplicable because the unions' lawsuits were mere shams, the court observed that "more than half of all the [unions'] actions as to which we know the results turn[ed] out to have merit," a fact that "cannot be reconciled with [petitioner's] charge that the unions were filing lawsuits and other actions willy-nilly without regard to success." *Id.* at 9a (quoting 31 F.3d at 811). The court of appeals, however, reversed the district court's award of Rule 11 sanctions against petitioner because, in its view, petitioner had repleaded the claims based on a good-faith (albeit mistaken) view that it was required to do so to preserve the issues for appeal. *Id.* at 9a, 41a; see 31 F.3d at 811-812.

3. In October 1995, acting on charges filed by the unions that petitioner had sued in federal court, the Board's General Counsel issued an administrative complaint against petitioner. Pet. App. 9a, 29a. The complaint alleged that petitioner violated Section 8(a)(1) of the NLRA by filing and maintaining a meritless lawsuit against the unions for a retaliatory purpose. *Id.* at 29a-30a.

The Board sustained the complaint. Pet. App. 25a-68a. The Board concluded that the unions' legislative lobbying efforts, filing of lawsuits, and institution of grievance and arbitration proceedings all concerned conditions of employment and were protected by Section 7 of the NLRA. *Id.* at 56a. The Board rejected petitioner's argument that the unions in fact engaged in

those activities with an unlawful secondary objective of driving non-union contractors out of the California construction market. *Id.* at 33a, 56a-57a. The Board explained that petitioner "brought the identical claims [of an unlawful secondary objective] to the district court" when it alleged violations of the Labor-Management Relations Act, and that petitioner had not appealed the district court's dismissal of its claims. *Id.* at 56a-57a. Thus, the Board found the district court's ruling preclusive of petitioner's defense that the unions' activities were not protected by the NLRA. *Id.* at 57a.

The Board then applied this Court's decision in *Bill Johnson's Restaurants*, *supra*, and held that petitioner's federal-court lawsuit "lacked merit" and was pursued "out of a desire to retaliate against the unions for engaging in protected concerted activity." Pet. App. 62a. The Board first noted that the district court and the Ninth Circuit had rendered judgment for the unions and against petitioner on all claims that they adjudicated, and that petitioner's voluntary dismissal of the remaining claims with prejudice acted as an adjudication on the merits. *Id.* at 46a-49a. Under *Bill Johnson's Restaurants*, therefore, petitioners' federal suit lacked merit. See *id.* at 44a-45a (citing *Bill Johnson's Restaurants*, 461 U.S. at 747).

The Board therefore turned to this Court's additional requirement that the suit must have been filed for a retaliatory purpose. See 461 U.S. at 744. A retaliatory purpose could be inferred, the Board held, from the fact that the suit was "aimed directly at protected activity," from the "utter absence of merit" to petitioner's claims under Section 303 of the Labor-Management Relations Act, and from petitioner's attempt (rejected by the district court, see 721 F. Supp. at 241) to seek damages from two unions that were not parties to the state-court

health-and-safety suit against petitioner. Pet. App. 59a, 60a, 61a. All of those facts, the Board held, "indicate[d] that [petitioner] was interested only in harassing the Unions, not in obtaining justice." *Id.* at 60a.

As a remedy for petitioner's violation of Section 8(a)(1), the Board ordered petitioner to, among other remedies, reimburse the unions for expenses they incurred in defending against petitioner's federal lawsuit. Pet. App. 62a. The Board noted (*id.* at 63a) that *Bill Johnson's Restaurants* explicitly authorized such an award. See 461 U.S. at 747. The Board also rejected petitioner's contention that its authority to award attorney's fees was limited to cases in which the violator of Section 8(a)(1) engaged in "frivolous" litigation. Pet. App. 63a. The Board explained it was awarding attorneys' fees, not as a sanction for filing a frivolous court suit, but as a remedy for petitioner's unfair labor practice in violation of Section 8(a)(1), and that the Board was authorized to award the unions make-whole relief for petitioner's violation of the NLRA. *Id.* at 64a.

4. The United States Court of Appeals for the Sixth Circuit enforced the Board's order. Pet. App. 1a-25a. The court of appeals first rejected petitioner's contention that, under *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527 (1992), unions (as opposed to employees) enjoy no protected Section 7 rights. Pet. App. 12a-16a. The court of appeals explained that the question before the Court in *Lechmere* was whether the NLRA authorized an organizing union to trespass on an employer's private property when the union had alternative means of access to the employees. *Id.* at 12a. In that context, this Court held that "the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers." *Lechmere*, 502 U.S. at 532. The court of appeals, however, agreed with the Board that *Lech-*

mere did not hold—and "[i]t would be a curious and myopic reading of the Act * * * to hold that, although employees are free to join unions and to work through unions for purposes of 'other mutual aid and protection,' the conduct of the unions they form and join for those purposes is not protected by the Act." Pet. App. 15a; see *id.* at 52a.

Next, the court of appeals upheld the Board's conclusion that petitioner's lawsuit against the unions constituted an unfair labor practice under *Bill Johnson's Restaurants*. Pet. App. 16a-22a. The court of appeals agreed with the Board that petitioner's suit was unmeritorious under *Bill Johnson's Restaurants* because the district court "had already determined that [petitioner's] claims against the unions were all either without merit or voluntarily dismissed." *Id.* at 17a; see 461 U.S. at 747. The court further rejected petitioner's argument that, under *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), the Board should have determined whether petitioner's suit was "baseless." Pet. App. 18a-19a. In *Professional Real Estate Investors*, this Court, quoting *Bill Johnson's Restaurants*, stated that "even an 'improperly motivated' lawsuit may not be *enjoined* under the National Labor Relations Act as an unfair labor practice unless such litigation is 'baseless.'" 508 U.S. at 59 (quoting *Bill Johnson's Restaurants*, 461 U.S. at 743-744) (emphasis added). The court of appeals found *Professional Real Estate Investors* "totally inapplicable" to this case, because it addresses solely "situations in which attempts were made *to enjoin* employer-initiated litigation, not situations in which court rulings had already been rendered." Pet. App. 19a. *Professional Real Estate Investors*, the court of appeals also noted, addressed the sham-litigation exception to *Noerr-Pennington* antitrust immunity, not the standards for finding an unfair labor practice. *Id.* at 18a-19a.

The court of appeals also upheld the Board's finding that petitioner filed its suit with a retaliatory motive. Pet. App. 20a-22a. The court found that the suit's demonstrated lack of merit; petitioner's filing of amended complaints that re-alleged claims on which the district court had already ruled; petitioner's pursuit of treble damages; and petitioner's attempts to obtain damages from two unions that (as opposing counsel had stated and extensive discovery had confirmed) were not parties to the state-court action, collectively supported the Board's finding of a retaliatory motive. *Ibid.*

Finally, the court of appeals upheld the Board's award of attorney's fees to the unions. Pet. App. 22a-25a. The court explained that the award was an appropriate exercise of the Board's authority to remedy petitioner's violation of protected Section 7 rights because it "return[ed] the injured parties, at least in part, to the financial positions they occupied prior to the filing of [petitioner's] unmerited, retaliatory suit." *Id.* at 24a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. This Court recently denied a petition for a writ of certiorari that presented the same issues as the instant petition. *Petrochem Insulation, Inc.* v. *NLRB*, cert. denied, No. 01-92 (Oct. 29, 2001). Further review likewise is not warranted in this case.

1. In *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983), this Court established one standard governing the Board's authority to enjoin an ongoing

lawsuit as an unfair labor practice, and another standard governing the Board's authority to sanction the filing of a completed lawsuit. *Id.* at 743-749. Before the Board may enjoin an ongoing suit that is retaliatory, it must find that the suit "lacks a reasonable basis." *Id.* at 748. To sanction the party who brought a completed lawsuit with retaliatory motive, the Board must find that the suit was "unmeritorious," which may be established by the judgment itself. *Id.* at 748-749; see *id.* at 746-747.[1]

In this case, petitioner challenges the Board's application of the completed-lawsuit standard of *Bill Johnson's Restaurants*. Petitioner contends (Pet. 5-12) that, to determine whether the underlying lawsuit was an unfair labor practice, the Board should have applied the "objectively baseless" standard articulated in *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60 (1993), and not followed the rule established in *Bill Johnson's Restaurants* (*i.e.*, that a judgment adverse to the plaintiff will support a finding of an unfair labor practice, when the suit was brought with retaliatory motive).[2]

---

[1] Contrary to petitioner's assertions (*e.g.*, Pet. 6, 8), the standard established in *Bill Johnson's Restaurants* for sanctioning the filing of a completed lawsuit was not dictum. Rather, this Court specifically stated its understanding that some claims in the underlying lawsuit had been dismissed, and it remanded so that the Board could apply the Court's standard for completed litigation to those claims. 461 U.S. at 750 n.15.

[2] Although *Bill Johnson's Restaurants* involved state-court litigation, petitioner does not question the Board's practice of adhering to the rules set out in that case when a federal lawsuit is the basis for an allegation of an unfair labor practice. See Pet. App. 44a n.28.

Like the Sixth Circuit in this case, the other courts of appeals that have considered the issue have uniformly rejected the argument that *Professional Real Estate Investors* overruled *Bill Johnson's Restaurants sub silentio*. See *Petrochem Insulation, Inc.* v. *NLRB*, 240 F.3d 26, 31-32 (D.C. Cir. 2001), cert. denied, No. 01-92 (Oct. 29, 2001); *White* v. *Lee*, 227 F.3d 1214, 1235-1236 (9th Cir. 2000).[3] *Professional Real Estate Investors* established that, for purposes of antitrust liability, "litigation cannot be deprived of immunity [under the *Noerr-Pennington* doctrine] as a sham unless the litigation is objectively baseless." 508 U.S. at 51. In so holding, the Court noted that the "objectively baseless" test is similar to the "baseless" standard that governs the Board's authority to enjoin an ongoing lawsuit under *Bill Johnson's Restaurants*. *Id.* at 59. But *Professional Real Estate Investors* did not address, much less alter, the standard stated in *Bill Johnson's*

---

[3] Petitioner's assertion (Pet. 10-11, 14-15) of a conflict between the court of appeals' decision in this case and the Second Circuit's decision in *NLRB* v. *Vanguard Tours, Inc.*, 981 F.2d 62 (1992), is unfounded. In *Vanguard Tours*, the Second Circuit held that, for purposes of applying *Bill Johnson's Restaurants*, a plaintiff's voluntary withdrawal of a state-court lawsuit does not "signif[y] a determination by the state court that the suit was 'without merit.'" *Id.* at 66. As the court of appeals below explained (Pet. App. 18a n.3), *Vanguard Tours* does not address the situation presented here, where "the majority of a plaintiff's cause of action is dismissed on the merits and only a portion is voluntarily withdrawn." Nor did the *Vanguard Tours* court address voluntary dismissal of claims *with prejudice*, which has the same effect as a dismissal on the merits. See *id.* at 49a & n.37. The *Vanguard Tours* court, moreover, explained that where, as here, "the plaintiff has lost on the merits[,] * * * the Board may consider the filing of the suit to have been an unfair labor practice" upon a showing of retaliatory motive. 981 F.2d at 65.

Restaurants for determining whether the filing of a *completed* lawsuit constituted an unfair labor practice. See Pet. App. 18a-19a; *Petrochem Insulation*, 240 F.3d at 32.

Petitioner notes (Pet. 8-10) that the D.C. Circuit (in *Petrochem Insulation*) and the Ninth Circuit (in *White*) have questioned whether the "unmeritorious" standard of *Bill Johnson's Restaurants* is consistent with the "objectively baseless" standard of *Professional Real Estate Investors*. It is, however, not clear—and indeed it appears unlikely—that any tension between the two standards has significance in this case. The Ninth Circuit and the federal district court in California together determined that all of the claims on which petitioner went to judgment were without merit. See *USS-POSCO Indus.* v. *Contra Costa County Bldg. & Constr. Trades Council*, 31 F.3d 800, 811 (9th Cir. 1994) ("The record * * * forecloses any possibility that [petitioner] could substantiate its [antitrust] claim."); *USS-POSCO Indus.* v. *Contra Costa County Bldg. & Constr. Trades Council*, 721 F. Supp. 239, 242 (N.D. Cal. 1989) (petitioner "cited no evidence" that would support its unfair-labor-practice claim based on unions' state-court suit); *USS-POSCO Indus.* v. *Contra Costa County Bldg. & Constr. Trades Council*, 692 F. Supp. 1166, 1170 (N.D. Cal. 1988) (complaint fails to contain allegations supporting claim that lobbying constituted an unfair labor practice; petitioner concedes that allegedly pretextual union grievances were in fact successful). The Board, moreover, found that petitioner's claims under Section 303 of the Labor-Management Relations Act, 29 U.S.C. 187, which were the core of petitioner's federal suit, suffered from an "utter absence of merit." Pet. App. 61a. In those circumstances, the Board could reasonably have concluded that petitioner's suit was

"objectively baseless" under *Professional Real Estate Investors*. See 508 U.S. at 60 (lawsuit is "objectively baseless" if "no reasonable litigant could realistically expect success on the merits" and it is not legally viable).

In any event, there is no clear "anomaly" (Pet. 5) in this Court's rule that, whereas a plaintiff is insulated from antitrust liability for filing a suit so long as it had an objective basis for the suit (even if the litigant does not ultimately prevail), an employer is subject to liability for committing an unfair labor practice if its retaliatory suit fails. The Ninth Circuit has noted that it may be appropriate to have a different rule in the labor-law context than in the antitrust context because of the special economic dependency of employees on their employers. See *White*, 227 F.3d at 1236-1237; see also *Bill Johnson's Restaurants*, 461 U.S. at 740 (noting that "[a] lawsuit no doubt may be used by an employer as a powerful instrument of coercion or retaliation"); *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 616-620 (1969) (discussing circumstances in which employer speech may violate the Act as a threat of retaliatory action against the employees' exercise of Section 7 rights). Moreover, a plaintiff who files a lawsuit with an improper motive faces lesser liability under the Act than under the antitrust laws. Compare *Bill Johnson's Restaurants*, 461 U.S. at 747 (Board may award defendants attorney's fees and other appropriate relief), with 15 U.S.C. 15(a) (authorizing treble damages and attorney's fees as remedy for antitrust violations).

Finally, and also contrary to petitioner's suggestion (Pet. 11), application of the *Bill Johnson's Restaurants* "unmeritorious" standard rather than the *Professional Real Estate Investors* "objectively baseless" standard does not "chill[] the right of employers everywhere to

petition the courts." *Bill Johnson's Restaurants* ensures that the employer may file a non-frivolous lawsuit and have it adjudicated on the merits by the courts. The employer will not be liable for committing an unfair labor practice if the suit proves meritorious. Even if the suit is found to lack merit, moreover, the employer will not face potential liability for violating Section 8(a)(1) unless it filed the suit with an improper, retaliatory motive. See 461 U.S. at 744-747.

2. Petitioner next asserts (Pet. 12-14) that the Board erred in finding an unfair labor practice under Section 8(a)(1) of the Act because petitioner sued only unions, not employees, and unions supposedly cannot claim the protections of Section 7. Petitioner's reliance on *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527 (1992), as support for that argument is misplaced. As the court of appeals correctly explained (Pet. App. 12a-13a), *Lechmere* held only that the Act does not authorize non-employee union representatives to trespass on employer property when the representatives could reach employees through reasonable alternative means. See 502 U.S. at 537-538. This case involves no issue of access to an employer's property. The *Lechmere* Court recognized, moreover, that Section 7 does protect union activities in some circumstances. *Id.* at 537. And the Court did not call into question the import of the plain language of Section 2(3) of the NLRA, which provides that the term "employee," as used in the Act, "shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise." 29 U.S.C. 152(3). Because unions are organizations of "employees" as defined in Section 2(3), interference with the rights of unions is, in many contexts, an interference with the Section 7 rights of employees. See, *e.g.*, *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers* v. *Austin*, 418 U.S. 264, 278-279 (1974) (Section 7 protects union "freedom of speech" in organizational context); *Geske & Sons, Inc.* v. *NLRB*, 103 F.3d 1366, 1377 (7th Cir.) (baseless lawsuit against union interferes with the organizational rights of employees), cert. denied, 522 U.S. 808 (1997); *O'Neil's Markets* v. *United Food & Commercial Workers' Union, Meatcutters Local 88*, 95 F.3d 733, 737 (8th Cir. 1996) (union's peaceful area-standards activity is protected by Section 7).

Contrary to petitioner's contention (Pet. 13-14), the Board did not "erroneously" rely on *Eastex, Inc.* v. *NLRB*, 437 U.S. 556 (1978), in concluding (Pet. App. 56a) that Section 7 protected the union activities that formed the basis for petitioner's federal lawsuit. In *Eastex*, the Court concluded that the "mutual aid or protection" clause of Section 7 (quoted at p. 2, *supra*) protects employees when they invoke administrative, legislative, and judicial processes in otherwise proper concerted activities that support employees of other employers. 437 U.S. at 564-566. The Board correctly noted in this case that, under *Eastex*, the unions' activities would be protected under Section 7 if engaged in by employees, whether or not those employees were employed by petitioner. Pet. App. 54a-55a, 56a & n.55. The Board, upheld by the court of appeals, reasonably rejected petitioner's "perverse" contention that "conduct * * * protected when engaged in by two or more employees together would lose its protection if engaged in by the employees' union on their behalf." *Id.* at 52a; see also *id.* at 14a-15a.

There is no merit to petitioner's further argument (Pet. 13) that the court of appeals' decision on the scope of Section 7 conflicts with *Diamond Walnut Growers, Inc.* v. *NLRB*, 53 F.3d 1085 (9th Cir. 1995). In *Dia-*

mond Walnut Growers, the Ninth Circuit applied *Bill Johnson's Restaurants* and held that the employer violated Section 8(a)(1) by filing a meritless and retaliatory suit against the union that "drained the [u]nion's resources, and had an inevitable impact on the employees who were exercising their Section 7 right to strike." *Id.* at 1090. Contrary to petitioner's suggestion (Pet. 13), the Ninth Circuit did *not* hold that a suit against a union is actionable under Section 8(a)(1) only in the context of a strike. Rather, the court expressly did not consider the extent to which Section 7 protects unions against retaliatory lawsuits in other contexts. *Diamond Walnut Growers*, 53 F.3d at 1090 n.4.

Petitioner also contends (Pet. 12-13) that the Sixth Circuit's decision in this case conflicts with *Johnson & Hardin Co.* v. *NLRB*, 49 F.3d 237 (6th Cir. 1995). Even if correct, petitioner's claim of an intra-circuit conflict would raise no issue warranting this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). In any event, petitioner's claim of an intra-circuit conflict is unfounded. As the court of appeals explained in this case (Pet. App. 12a n.2), *Johnson & Hardin* followed *Lechmere* and "stands for the proposition that non-employee organizers may enter onto private property only under extremely limited circumstances," but it "does not * * * stand for the broader legal principle that unions have no § 7 rights whatsoever." See 49 F.3d at 241-242 (upholding Board's finding that employer violated Section 8(a)(1) by removing union organizers from a driveway leading to its plant).

3. Petitioner next argues (Pet. 14) that the court of appeals departed from *Bill Johnson's Restaurants*

when it upheld the Board's determination that petitioner filed its lawsuit with a retaliatory motivation. See Pet. App. 20a-22a. There is no merit to that argument. *Bill Johnson's Restaurants* specifically provides that the Board may consider an adverse judgment entered against a plaintiff employer when determining whether the employer's suit was filed in retaliation for the exercise of rights protected by Section 7. 461 U.S. at 747. Applying that principle, the court of appeals (like the Board) correctly viewed the "judicial finding" that petitioner's suit lacked merit to be "*one consideration*" supporting a finding that "[petitioner] did indeed possess [a] * * * retaliatory motivation in prosecuting its suit against the union defendants." Pet. App. 20a, 21a-22a; see also *id.* at 60a-61a.

The court of appeals' ruling on the issue of retaliatory motive also does not conflict with any decision of another court of appeals. Contrary to petitioner's suggestion (Pet. 14), the District of Columbia Circuit has *not* held that a suit may be found to be retaliatory only if it is "utterly frivolous." Rather, that court concluded in *Petrochem Insulation* that the Board may consider the fact that an employer's suit is completely without merit when determining whether the employer acted with retaliatory intent in filing the suit. See 240 F.3d at 32-33. Nothing in the decision below is to the contrary. In *NLRB* v. *International Union of Operating Engineers, Local 520*, 15 F.3d 677 (7th Cir. 1994) (cited at Pet. 14), the Seventh Circuit simply concluded that substantial evidence did not support the Board's finding that a union acted with retaliatory intent in filing a meritless libel suit against one of its members, given the employee's dishonesty and the union's "legitimate reputational concerns." *Id.* at 680. No analogous circumstances are presented here.

Petitioner further asserts (Pet. 15-16) that, when the court of appeals affirmed the Board's finding of a retaliatory motive, it erred by relying in part on petitioner's attempt to recover treble damages against the unions—to which the Board had not explicitly given weight in this case. That claim of error presents no issue of sufficient importance to warrant further review. The court of appeals' view (Pet. App. 21a) that asserting a treble-damages claim is "another factor to be considered in evaluating an employer's motive in prosecuting its lawsuit" is entirely consistent with the Board's position and the holdings of other courts of appeals. See, *e.g.*, *Petrochem Insulation*, 240 F.3d at 34 (upholding Board determination that employer's pursuit of antitrust treble damages supported finding of retaliation); *Diamond Walnut Growers*, 53 F.3d at 1089 (upholding Board finding that request for punitive damages suggests retaliatory motive).[4] The court of appeals, moreover, agreed with the Board that "an additional inference of retaliatory motive may be made from the fact that [petitioner] sought recompense" from unions that clearly were not parties to the state-court suit against petitioner. Pet. App. 21a; see also *id.* at 60a.

4. There is also no merit to petitioner's contention (Pet. 16-17) that the Board "should have * * * given res judicata effect" to the Ninth Circuit's determination that attorney's fees were not warranted in the case of

[4] *International Union of Operating Engineers*, *supra*, on which petitioner relies (Pet. 16), is not to the contrary. In that case, the Seventh Circuit explained that a request for money damages may support an inference that the lawsuit was filed for retaliatory purposes when "independent evidence of retaliatory motive exist[s] apart from the * * * request for money damages." 15 F.3d at 680. There was such evidence here. See pp. 6-7, 9, *supra*.

USS-POSCO Industries v. *Contra Costa County Building & Construction Trades Council*. In that case, the Ninth Circuit reversed the district court's award of attorney's fees against petitioner as a sanction for violating Rule 11 of the Federal Rules of Civil Procedure. See 31 F.3d at 811-812. The Ninth Circuit found that petitioner had repleaded previously dismissed claims out of a legitimate (although incorrect) belief that it was required to do so to preserve the issues for appeal. *Ibid.* That ruling by the Ninth Circuit has no bearing on the questions before the Board and the Sixth Circuit in this case—whether petitioner's lawsuit was an unfair labor practice under *Bill Johnson's Restaurants*, and, if so, whether an award of attorney's fees to the unions was an appropriate make-whole remedy for that violation of the NLRA.[5]

Finally, petitioner contends (Pet. 17-18) that the Board's award of attorney's fees is inconsistent with *Summit Valley Industries, Inc.* v. *Local 112, United Brotherhood of Carpenters*, 456 U.S. 717 (1982). *Summit Valley Industries* established that attorney's fees incurred during earlier Board proceedings "are not a proper element of damages" in a court action brought under Section 303 of the Labor Management Relations Act, 29 U.S.C. 187. 456 U.S. at 727. *Summit Valley* did not involve an award of attorney's fees by the Board, nor did it present the situation of a party who was

[5] Although petitioner argues (Pet. 18) that the Sixth Circuit's approval of the award of attorney's fees in this case conflicts with that court's earlier decision in *Johnson & Hardin*, *supra*, the decision below explained (Pet. App. 22a) that there is no conflict. In any event, petitioner's claim of an intra-circuit conflict would not support a grant of certiorari. See *Wisniewski*, 353 U.S. at 902.

forced to defend against a meritless and retaliatory lawsuit. The Court addressed that situation a year later in *Bill Johnson's Restaurants*, which expressly authorizes the Board to award attorney's fees to the targets of unmeritorious retaliatory suits that violate the NLRA. See 461 U.S. at 747. The Board and the court of appeals correctly applied *Bill Johnson's Restaurants* in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ARTHUR F. ROSENFELD
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board

DECEMBER 2001

Supreme Court, U.S.
FILED
DEC 5 2001
OFFICE OF THE CLERK

No. 01-518

IN THE

Supreme Court of the United States

BE&K CONSTRUCTION CO.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

PETER D. NUSSBAUM*
MEERA TREHAN
ALTSHULER, BERZON, NUSSBAUM, RUBIN & DEMAIN
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

SANDRA RAE BENSON *
THEODORE FRANKLIN
VAN BOURG, WEINBERG, ROGER & ROSENFELD
180 Grand Avenue, 14th Floor
Oakland, CA 94512-3741
(510) 839-6600

* Counsel of Record

(Parties Represented by Above Counsel Listed on Inside Cover)

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

Attorneys for Intervenors
International Brotherhood of Electrical Workers, Local 302, AFL-CIO; and Local 342, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO

Attorneys for Intervenors
District Council of Iron Workers of the State of California and Vicinity, International Union of Bridge, Structural and Ornamental Iron Workers, AFL-CIO; Contra Costa County Building and Construction Trades Council, AFL-CIO; Northern California District Council of Laborers, Laborers International Union of North America; Bay Counties District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL-CIO; Local Union No. 378, International Union of Bridge, Structural and Ornamental Iron Workers, AFL-CIO; Cement Masons Union Local No. 825, Operative Plasterers and Cement Masons International Association, AFL-CIO; and Local No. 549, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly held that *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), authorized the NLRB to find that BE&K's meritless lawsuit, seeking treble damages against Intervenors, a group of labor organizations, violated the National Labor Relations Act ("NLRA") by interfering with the Section 7 right of Intervenors' member "employees" to engage in concerted activities for the purpose of mutual aid and protection?

2. Whether the Court of Appeals properly held that substantial evidence on the record as a whole supported the NLRB's factual finding that BE&K's meritless lawsuit was filed to retaliate against Intervenors' exercise of rights protected by the NLRA?

3. Whether the Court of Appeals properly held, pursuant to *Bill Johnson's Restaurants*, that once the NLRB found an unfair labor practice it had the authority to award Intervenors the attorneys' fees they incurred in defending against BE&K's meritless and retaliatory lawsuit because the award of such fees would, pursuant to Section 10(c) of the NLRA, "effectuate the policies" of that statute?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT	1
REASONS FOR DENYING THE WRIT	4
I. BE&K'S LAWSUIT WAS "UNMERITORIOUS" PURSUANT TO *BILL JOHNSON'S RESTAURANTS*	5
II. BE&K'S ACTIONS AGAINST INTERVENOR UNIONS VIOLATED THE NLRA	9
III. SUBSTANTIAL EVIDENCE SUPPORTED THE BOARD'S FINDING THAT BE&K'S MERITLESS LAWSUIT WAS FILED TO RETALIATE AGAINST INTERVENORS' EXERCISE OF RIGHTS PROTECTED BY THE NLRA	11
IV. THE AWARD OF ATTORNEYS' FEES INCURRED BY INTERVENORS IN DEFENDING AGAINST BE&K'S MERITLESS AND RETALIATORY LAWSUIT WAS NECESSARY AND PROPER TO REMEDY BE&K'S UNFAIR LABOR PRACTICE	13
CONCLUSION	16

TABLE OF AUTHORITIES

CASES — Page

BE&K Constr. Co. v. NLRB, 246 F.3d 619 (6th Cir. 2001) ..... *passim*
BE&K v. Carpenters, 90 F.3d 1319 (8th Cir. 1996) 2
Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983) ..... *passim*
California Motor Transport Co., Inc. v. Trucking Unlimited, 404 U.S. 508 (1972) 7
Cardtoons v. Major League Baseball Players Ass'n., 208 F.3d 885 (10th Cir.) (*en banc*), *cert. denied*, 531 U.S. 873 (2000) 6, 8
Diamond Walnut Growers, Inc. v. NLRB, 53 F.3d 1085 (9th Cir. 1995), *enf'g* 312 NLRB 61 (1993) 6, 8, 10, 11, 12
Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961) 3
Geske & Sons v. NLRB, 103 F.3d 1366 (7th Cir. 1997), *enf'g* 317 NLRB 28 (1995) 10
J.P. Stevens & Co. v. NLRB, 668 F.2d 767 (4th Cir.) *vacated and remanded*, 458 U.S. 1118 (1982), *supplemented by* 268 NLRB 8 (1983) ... 14
Johnson & Hardin Co. v. NLRB, 49 F.3d 237 (6th Cir. 1995) 6, 8, 11, 15
Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992) 9, 10
Lucile Salter Packard Childrens' Hosp. v. NLRB, 97 F.3d 583 (D.C. Cir. 1996), *enf'g* 318 NLRB 433 (1995) 10
NLRB v. International Union of Operating Engineers, 15 F.3d 677 (7th Cir. 1994) 6, 8, 13
NLRB v. Vanguard Tours, 981 F.2d 62 (2d Cir. 1992) 6, 8, 13
NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969) 12

TABLE OF AUTHORITIES—Continued

Page

NLRB v. Yeshiva Univ., 444 U.S. 672 (1980) 12
O'Neil's Markets v. NLRB, 95 F.3d 733 (8th Cir. 1996), *enf'g in relevant part* 318 NLRB 646 (1995) 10
Petrochem Insulation, Inc. v. NLRB, 240 F.3d 26 (D.C. Cir. 2001), *enf'g* 330 NLRB No. 10 (1999), *cert. denied*, 70 U.S.L.W. 3312 (U.S. Oct. 29, 2001) (No. 01-92) ..... *passim*
Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., 508 U.S. 49 (1993) 5, 7, 8
Summit Valley Indus., Inc. v. Local 112, United Bhd. of Carpenters, 456 U.S. 717 (1982) 14
Thunder Basin Coal v. Reich, 510 U.S. 200 (1994) 10
United Mine Workers v. Pennington, 381 U.S. 657 (1965) 3
USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council, 31 F.3d 800 (9th Cir. 1994) 4, 15
Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) 12
Warth v. Seldin, 422 U.S. 490 (1975) 10
White v. Lee, 227 F.3d 1214 (9th Cir. 2000) 6, 8

FEDERAL STATUTES

29 U.S.C. § 107(e) 15
29 U.S.C. § 152(5) 10
29 U.S.C. § 157 ..... 9, 10
29 U.S.C. § 158(a)(1) 4
29 U.S.C. § 160(c) 13
29 U.S.C. § 187 ..... 3, 14

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES — Page

James D. Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr*, 74 Geo. L.J. 65, 105 (1985)..... 8
Supreme Court Rule 10..... 11

IN THE

Supreme Court of the United States

No. 01-518

BE&K CONSTRUCTION CO.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION *

STATEMENT

A. This Petition for a Writ of Certiorari raises legal issues that are "virtually identical" to those presented by the recently denied petition for certiorari in *Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26 (D.C. Cir. 2001), *cert. denied*, 70 U.S.L.W. 3312 (U.S. Oct. 29, 2001) (No. 01-92).[1] The Petition in this case also does not merit review.

Petrochem and this case arose from employer attempts to impose treble damage antitrust liability on unions based upon

* This Brief in Opposition is filed on behalf of Intervenors, who were parties in the court below and, therefore, are parties in this Court pursuant to Rule 12.6 of the Court's rules. This Brief supports the position being taken by Respondent, National Labor Relations Board.

[1] *See* Letter from Lawrence W. Marquess, Esq., counsel for Petrochem Insulation, Inc. to Francis Lorson, Chief Deputy Clerk, Supreme Court of the United States (Oct. 23, 2001).

their governmental petitioning activities. In both cases, the district courts summarily dismissed the lawsuits and the Ninth Circuit unanimously affirmed. Thereafter, in each case, the National Labor Relations Board ("Board" or "NLRB") applied the clear standards established by this Court in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983) and found that the employer's lawsuit was both meritless and retaliatory and, therefore, violated the National Labor Relations Act ("NLRA"). A panel of the D.C. Circuit in *Petrochem*, and a panel of the Sixth Circuit in this case, unanimously affirmed the Board; and no judge voted to rehear either of the cases *en banc*.

B. This case arises from a labor dispute between Petitioner BE&K, a nationwide non-union general contractor, and Intervenors, who are local labor organizations. In the late 1980s, BE&K bid on a large construction project in California. Although Intervenors objected, BE&K was awarded the contract. Pet.App. 4a. Despite the fact that it suffered no damages, BE&K initiated antitrust litigation against Intervenors designed, as the Sixth Circuit found, to "squelch certain concerted activity in which the unions were engaging on behalf of members who were on the BE&K construction site as employees of various sub-contractors and to ensure safe working conditions on the job-site." Pet.App. 3a.[2]

Petitioner's lawsuit primarily targeted Intervenors' governmental lobbying and petitioning activities. *See* Pet.App. 4a.

[2] This was not the first time that BE&K filed a meritless lawsuit against unions with whom it had a labor dispute. *See BE&K v. Carpenters*, 90 F.3d 1319, 1325-27 (8th Cir. 1996) (case meritless as a matter of law); *BE&K v. Carpenters*, Civil Action No. CV95-6078 (Ala. Cir. Ct., July 2, 1998) (granting summary judgment against BE&K). BE&K has also settled NLRB charges similar to those in this case by agreeing to reimburse a union for the attorneys' fees it incurred, and by agreeing to post a notice promising not "to file or maintain baseless lawsuits for the purpose of retaliation." *BE&K Constr. Co.*, Case No. 26-CA-17650 (1997).

BE&K's initial complaint alleged that Intervenors' concerted activities violated Section 303 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C.§ 187. The district court summarily dismissed most of the complaint, noting that much of Intervenors' challenged activities were protected by the First Amendment. Pet.App. 5a-6a.[3]

BE&K next filed an amended complaint adding allegations under the antitrust laws. That complaint was also summarily dismissed by the district court. Pet.App. 6a.

Finally, BE&K filed a second amended complaint reasserting many of its previous allegations. The district court dismissed the allegations it had previously rejected, and sanctioned BE&K under Rule 11 for continuing to raise them. Pet.App. 7a. Ultimately, the court also granted Intervenors' motion for summary judgment on the antitrust claim; and BE&K voluntarily dismissed its remaining Section 303 claims with prejudice, waiving any right to appeal them. Pet.App. 8a.

C. Before the Ninth Circuit, BE&K challenged only the dismissal of its antitrust claim and the district court's imposition of sanctions. Pet.App. 8a. The Court of Appeals unanimously affirmed the dismissal based on the *Noerr-Pennington* doctrine.[4] Judge Kozinski, writing for the court,

[3] When the lawsuit was commenced, Intervenors informed BE&K's counsel that it was frivolous because most of the unions' alleged unlawful conduct was protected by the First Amendment and, therefore, immune from liability. BE&K's counsel responded that he had been instructed to "stop [the unions'] conduct" and, accordingly, had filed a "novel" lawsuit, although he was unaware of any cases that contradicted the unions' claim of First Amendment immunity. Joint Appendix in Sixth Circuit Court of Appeals ("Joint Appendix") at 68, 334. Thus, contrary to BE&K's assertion (Pet. 11), it is not "undisputed" that Petitioner "had a reasonable belief that it would prevail."

[4] *See Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S.

held that as a matter of law "[t]he record . . . forecloses any possibility BE&K could substantiate its [antitrust] claim." *USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council*, 31 F.3d 800, 811 (9th Cir. 1994). The court rejected BE&K's claim that Intervenors had engaged in "sham" conduct, finding that Intervenors' petitioning activities "cannot be reconciled with the charge that [they] were filing lawsuits and other actions willy-nilly without regard to success." *Id.* at 811 (emphasis added).[5]

D. After the Ninth Circuit affirmed the dismissal of BE&K's lawsuit, the NLRB applied the principles set forth in *Bill Johnson's* and held unanimously that Petitioner violated Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), by litigating (i) a meritless lawsuit against Intervenors (ii) in retaliation for their having engaged in protected concerted activity on behalf of their members. Pet.App. 28a-68a. The Sixth Circuit unanimously affirmed the Board, Pet.App. 1a-25a, and no member of the court voted in favor of BE&K's petition for rehearing *en banc*. Pet.App. 26a.

REASONS FOR DENYING THE WRIT

While BE&K contends that four separate holdings by the Sixth Circuit warrant the granting of certiorari, in fact no aspect of the decision below merits review under any of this Court's usual criteria.

First, the Court of Appeals' decision did not break any new legal ground. Rather, when reviewing the Board's determination that BE&K's lawsuit constituted an unfair labor

---

657 (1965), holding that governmental petitioning activity is immune from antitrust liability unless it is "sham."

[5] The Ninth Circuit also reversed the imposition of Rule 11 sanctions against BE&K because Petitioner's belief that it had to reassert previously dismissed claims to preserve them for appeal, although wrong, was not frivolous. *Id.* at 812. Thus, the reversal of sanctions had nothing to do with the *merits* of BE&K's lawsuit. *Id.*; Pet.App. 48a.

practice which warranted the normal remedial order, the Sixth Circuit simply applied the principles established by this Court's unanimous decision in *Bill Johnson's*.

Second, despite BE&K's claim to the contrary, there is no conflict among the circuits regarding the meaning or application of *Bill Johnson's*.

Third, there is no intra-circuit conflict between this case and another decision of the Sixth Circuit and, even if there were, that would not be a compelling reason for granting certiorari.

We will respond to the questions presented by BE&K in the same order that they are raised in its petition.

I. BE&K'S LAWSUIT WAS "UNMERITORIOUS" PURSUANT TO *BILL JOHNSON'S RESTAURANTS*.

BE&K first claims that the clear language in *Bill Johnson's*, relied upon by the NLRB and the Court of Appeals, was *dicta* by this Court that was implicitly rejected in *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49 (1993); and that there is a split among the circuits regarding the proper interpretation of *Bill Johnson's*. These contentions are without merit.

1. In *Bill Johnson's*, the Court held that while a *pending* lawsuit can be *enjoined* as an unfair labor practice only if it is *baseless* (*id.* at 744), a different standard is applicable once the lawsuit is *completed*:

> *If judgment goes against the employer in . . . court . . . or if his suit is withdrawn or is otherwise shown to be* ***without merit***, the employer has had its day in court . . . and the Board may then proceed to adjudicate the §8(a)(1) . . . unfair labor practice case.

Id. at 747 (emphasis added); *accord, id.* at 749 ("*If the . . . proceedings result in a judgment adverse to the plaintiff*, the

Board may then consider the matter further and, if it is found that the lawsuit was filed with retaliatory intent, the Board may find a violation and order appropriate relief.") (emphasis added). The Courts of Appeals have consistently found that *Bill Johnson's* means what it says, and have applied its clearly articulated post-adjudication standard. *See, e.g., BE&K Constr. Co. v. NLRB*, 246 F.3d 619, 629 (6th Cir. 2001); *Petrochem*, 240 F.3d at 32; *Diamond Walnut Growers, Inc. v. NLRB*, 53 F.3d 1085, 1088 (9th Cir. 1995); *Johnson & Hardin Co. v. NLRB*, 49 F.3d 237, 243 (6th Cir. 1995); *NLRB v. Vanguard Tours*, 981 F.2d 62, 65 (2d Cir. 1992); *NLRB v. International Union of Operating Engineers*, 15 F.3d 677, 679 (7th Cir. 1994); *see also White v. Lee*, 227 F.3d 1214, 1237 (9th Cir. 2000); *Cardtoons v. Major League Baseball Players Ass'n.*, 208 F.3d 885, 887 n.4 (10th Cir.) (*en banc*), *cert. denied*, 531 U.S. 873 (2000).

Petitioner would dismiss the above-quoted statements from *Bill Johnson's* as mere "*dicta*" in which this Court "briefly opined" (Pet. 6) on what might be the correct standard in a case different from the one under consideration. But the Court's considerable discussion of the post-adjudication standard cannot be so characterized. In order to explicate the heightened standard that must be met before a *pending* lawsuit can be *enjoined* as an unfair labor practice, the Court necessarily contrasted it with the basic standard that must be met before a lawsuit that has been *adjudicated* may be found to constitute an unfair labor practice:

> [A]lthough it is an unfair labor practice to prosecute an unmeritorious lawsuit for a retaliatory purpose, the offense is not enjoinable unless the suit lacks a reasonable basis.

461 U.S. at 749. Articulation of the post-adjudication standard was also integral to the opinion because the Court directed the Board to apply that standard on remand should the employer's state court lawsuit have been dismissed:

> If [the employer's] other claims have been finally adjudicated to be lacking in merit, on remand the Board may reinstate its finding that petitioner acted unlawfully by prosecuting these unmeritorious claims if the Board adheres to its previous finding that the suit was filed for a retaliatory purpose."

461 U.S. at 749 n.15. *See also id.* at 736 n. 3.[6]

2. Contrary to BE&K's assertion, *Professional Real Estate* did not implicitly reject the post-adjudication standard that *Bill Johnson's* established, in the labor context, for determining whether a lawsuit constitutes an unfair labor practice. Rather, *Professional Real Estate* simply "define[d] the 'sham' exception to the doctrine of *antitrust* immunity first identified in [*Noerr*]." 508 U.S. at 51 (emphasis added). The Court clarified that there cannot be *antitrust treble damage liability* for the filing of a lawsuit that is not "objectively baseless." *Id.* at 60-61; *see BE&K Constr. Co.*, 246 F.3d at 629 (*Professional Real Estate* "involved only . . . immunity from *antitrust* liability."). But the Court did not suggest (*see* Pet. 7) that *Professional Real Estate's* "objectively baseless" standard was "synonymous" with the post-adjudication standard of "without merit" established by *Bill Johnson's*. Indeed, the Court recognized that the antitrust law's sham exception is akin to the *Bill Johnson's* standard for *enjoining* a lawsuit as an unfair labor practice. *See* 508 U.S. at 59; *accord, Bill Johnson's*, 461 U.S. at 741, 744 (citing *California Motor Transport Co., Inc. v. Trucking Unlimited,*

---

[6] The Court's articulation of the post-adjudication standard clearly was not inadvertent. The briefs before the Court discussed the *Noerr-Pennington* antitrust standard and the similarities and differences between the antitrust and labor contexts. *See* Respondent's Br. in No. 81-2257 at 31-33 & n.2; Petitioner's Reply Br. in No. 81-2257 at 9-11. Moreover, during oral argument, the Court repeatedly questioned counsel about how the standard for reviewing a retaliatory lawsuit *after* it had been adjudicated should differ from the standard for deciding whether to *enjoin* such a lawsuit. *See* Oral Arg. Tr. at 7, 19, 20, 44, 45 in No. 81-2257.

404 U.S. 508 (1972)). Since *Professional Real Estate*, the Courts of Appeals have continued to apply *Bill Johnson's* "without merit" standard when determining whether an adjudicated lawsuit violates the NLRA. *See BE&K Constr. Co.*, 246 F.3d at 629; *Petrochem*, 240 F.3d at 31-32; *Diamond Walnut Growers*, 53 F.3d at 1088; *Johnson & Hardin*, 49 F.3d at 243; *International Union of Operating Engineers*, 15 F.3d at 679.[7]

3. BE&K attempts to create a circuit split by implying that the Second Circuit in *Vanguard Tours* applied a "reasonable basis" standard for assessing whether a lawsuit that is "judicially determined" is "meritless" within the meaning of *Bill Johnson's*. Pet. 11. *Vanguard Tours*, however, interpreted the *Bill Johnson's* post-adjudication standard consistently with every other circuit that has addressed the issue: "If the plaintiff has lost on the merits—even if he had a reasonable basis in bringing his suit—the Board may consider the filing of the suit to have been an unfair labor practice." 981 F.2d at 65. The Second Circuit did question whether a suit that is *voluntarily withdrawn* should be viewed as

[7] This Court's different accommodations between the antitrust laws and the First Amendment on the one hand (*Professional Real Estate*), and between the NLRA and the First Amendment on the other (*Bill Johnson's*), reflect that antitrust and labor law are two entirely distinct statutory schemes, with different purposes and remedies. *White*, 227 F.3d at 1236-37; *Cardtoons*, 208 F.3d at 888-90 & n.4. The potential liability for having brought an unsuccessful lawsuit is far greater when the antitrust laws are invoked (*i.e.*, treble damages) than when an unfair labor practice is alleged (*i.e.*, attorneys' fees). *See* James D. Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr*, 74 Geo. L.J. 65, 105 (1985). Moreover, the potential "chilling effect of a . . . lawsuit upon an employee's willingness to engage in protected activity" exists only in the labor context. *Bill Johnson's*, 461 U.S. at 741. Finally, while an employer's right to bring a retaliatory lawsuit must be balanced against the First Amendment protected associational rights of employees, no such countervailing right exists in the antitrust context. *See White*, 227 F.3d at 1237.

"without merit," pursuant to *Bill Johnson's*. *Id.* at 66. But, as the Sixth Circuit noted in this case, "*Vanguard Tours* . . . did not address the situation in which the majority of the plaintiff's cause of action is dismissed *on the merits* and only a portion is voluntarily withdrawn." *BE&K Constr. Co.*, 246 F.3d at 629 n.3.[8]

II. BE&K'S ACTIONS AGAINST INTERVENOR UNIONS VIOLATED THE NLRA.

BE&K next argues that its meritless lawsuit could not have violated the NLRA because it was brought against labor unions, rather than "employees." The Board and the Court of Appeals also applied settled law in rejecting that claim.

1. BE&K relies upon a single sentence in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), which did not announce the sweeping revision of existing law that BE&K attributes to it. *See* Pet. 12; *BE&K Constr. Co.*, 246 F.3d at 625. The only issue in *Lechmere* was whether an employer, who denies union organizers access to its private property, violates the Act by interfering with the Section 7 right of *its* employees to engage in "self-organization." *See* 502 U.S. at 531-32; 29 U.S.C. § 157. It was in that context that this Court stated: "the NLRA confers rights only on *employees*, not on unions or their non-employee organizers." *Id.* at 532.

That statement, however, does not support BE&K's claim that the Intervenor unions had no "standing" to invoke Section 7 protections on behalf of their members, who *are* "employees." Though BE&K refers to Intervenors as "non-employee labor organizations," Pet. 3, that label is a

[8] As noted earlier, BE&K voluntarily dismissed only certain of its Section 303 claims; and that dismissal was with prejudice and without any right of appeal. Moreover, because the voluntarily dismissed claims had never been pursued, Intervenors incurred (at most) *de minimus* legal fees with regard to them. Accordingly, as a practical matter, the Board's order granting Intervenors their attorneys' fees has no application to those claims.

misnomer since an entity can only be a "labor organization" if "employees participate" in it. *See* 29 U.S.C. § 152(5). And because Section 7 affords "employees" the right to "form, join, or assist labor organizations . . . for the purpose of . . . mutual aid or protection," to permit an employer, such as BE&K. to retaliate with impunity against a union for engaging, on behalf of its members, in such mutual aid and protection as governmental petitioning activities, would impair the Section 7 associational rights of the union's member "employees" by denying them the means to engage effectively in concerted actions protected by the NLRA. *See Warth v. Seldin*, 422 U.S. 490, 511 (1975); *Geske & Sons v. NLRB*, 103 F.3d 1366, 1377, 1378 n.16 (7th Cir. 1997); *Diamond Walnut Growers*, 53 F.3d at 1089-90.

In *Lechmere*, after the statement quoted above that BE&K relies upon, this Court went on specifically to note that an employer's actions against a union *can* violate the NLRA. *See* 502 U.S. at 537; *accord, Thunder Basin Coal v. Reich*, 510 U.S. 200, 217 n.21 (1994); *BE&K Constr. Co.*, 246 F.3d at 627. As the D.C. Circuit stated in *Petrochem*, "we cannot imagine a more reasonable interpretation" of the Act (240 F.3d at 29); and, since *Lechmere*, the Board and Courts of Appeals have continued to find that various employer conduct directed at labor organizations is violative of the NLRA. *See, e.g., Petrochem*, 240 F.3d at 29, *enf'g* 330 NLRB No. 10 (1999); *Geske & Sons*, 103 F.3d at 1377, *enf'g* 317 NLRB 28 (1995); *Lucile Salter Packard Childrens' Hosp. v. NLRB*, 97 F.3d 583, 592 (D.C. Cir. 1996), *enf'g* 318 NLRB 433 (1995); *O'Neil's Markets v. NLRB*, 95 F.3d 733, 739 (8th Cir. 1996), *enf'g in relevant part* 318 NLRB 646 (1995); *Diamond Walnut Growers*, 53 F.3d at 1089-90, *enf'g* 312 NLRB 61 (1993).

2. BE&K again attempts to create a circuit split where none exists. In *Diamond Walnut*, the Ninth Circuit held (consistent with the Sixth Circuit in this case) that an

employer that files a meritless, retaliatory lawsuit against a *union* commits an unfair labor practice pursuant to *Bill Johnson's*. 53 F.3d at 1089-90.

BE&K also mistakenly asserts that there is a conflict between the Sixth Circuit's earlier ruling in *Johnson & Hardin* and its decision in this case. Pet. 12-13. But *Johnson & Hardin* held that an employer violated the NLRA by excluding union organizers from its property, 49 F.3d at 242; and that holding is consistent with the principle, applied by the Sixth Circuit in this case, that employer conduct directed against a labor organization can constitute an unfair labor practice. Moreover, no Circuit judge voted to rehear this case *en banc*, *see* Pet.App. 26a; and even if there were an intra-circuit conflict (which there is not), that is not a compelling reason for granting certiorari. *See* Supreme Court Rule 10.

III. SUBSTANTIAL EVIDENCE SUPPORTED THE BOARD'S FINDING THAT BE&K'S MERITLESS LAWSUIT WAS FILED TO RETALIATE AGAINST INTERVENORS' EXERCISE OF RIGHTS PROTECTED BY THE NLRA.

BE&K also contends that certiorari should be granted because the Sixth Circuit improperly considered Petitioner's request for treble damages as evidence of its retaliatory intent, and because the Sixth Circuit's decision conflicts with that of another circuit. Again, there is no merit to these claims.

1. The Sixth Circuit properly found that "substantial evidence in the record convincingly indicates that BE&K did indeed possess an improper, illegal retaliatory motivation." *BE&K Constr. Co.*, 246 F.3d at 630-31. The relevant evidence included: (1) the lack of merit of the underlying suit as evidenced by its summary dismissal; (2) BE&K's decision to seek treble damages against Intervenors; and (3) "the fact that BE&K sought recompense from two union organizations for a previous lawsuit" to which they were not parties, and that

BE&K refused to dismiss those unions even after "extensive discovery [did not] uncover any evidence of [their] participation." *Id.* at 630.[9]

BE&K asserts, however, that the Sixth Circuit improperly considered Petitioner's demand for treble damages because the Board did not rely on that evidence for its determination of retaliation. Pet.15. But the Board specifically found (and it is undisputed) that BE&K sought such punitive damages against Intervenors. Pet.App. 35a. The Sixth Circuit simply considered that evidence, which was in the record before it, when it affirmed the Board's factual finding of retaliation. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951) (agency factual findings will be upheld if "on the record as whole there is substantial evidence" to support such findings). No basis exists for granting certiorari because, as this Court stated in *Universal Camera*, "Congress placed [the substantial evidence inquiry] in the keeping of the Courts of Appeals. This Court will intervene only . . . when the standard appears to have been misapprehended or grossly misapplied." *Id.*[10]

---

[9] When Intervenors initially informed BE&K's counsel that the two unions in question had no connection to the prior lawsuit, he conceded that he had no evidence to the contrary but refused to dismiss them from the claim based on that litigation. Joint Appendix at 68, 334.

[10] *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980), cited by Petitioner, is inapposite. There, on appeal, the Board based its argument on a *legal* theory "that d[id] not appear clearly in any Board opinion." *Id.* at 685. Here, by contrast, the Court of Appeals affirmed a *factual* finding by the Board based on evidence that was cited in the Board's opinion. Moreover, it was clear to the Sixth Circuit that the Board considers a request for treble or punitive damages to be evidence of retaliatory motive. *See, e.g., Petrochem*, 330 NLRB No. 10 at 5 (1999), *enf'd* 240 F.3d 26; *Diamond Walnut*, 312 NLRB 61, 69 (1993), *enf'd* 53 F.3d 1085. Thus, "[t]here is not the slightest uncertainty" that the Board would find retaliation if the case were remanded. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (plurality op.).

2. Contrary to BE&K's assertion, the Sixth Circuit's consideration of treble damages as evidence of retaliation does not create a circuit split with *International Union of Operating Engineers*. *See* Pet. 16. In that case, the Seventh Circuit found that while "it is well established that a . . . request for money damages . . . may support an inference that the lawsuit was filed for retaliatory purposes," under the facts presented in *Operating Engineers* the request for punitive damages *by itself* was "not sufficient to support a finding of retaliatory intent." 15 F.3d at 680. There is no conflict between that holding and the finding by the Sixth Circuit that a demand for treble damages, *together with other evidence*, supported the Board's finding of retaliation.[11]

IV. THE AWARD OF ATTORNEYS' FEES INCURRED BY INTERVENORS IN DEFENDING AGAINST BE&K'S MERITLESS AND RETALIATORY LAWSUIT WAS NECESSARY AND PROPER TO REMEDY BE&K'S UNFAIR LABOR PRACTICE.

Lastly, BE&K contends that certiorari should be granted because the Sixth Circuit erred in upholding the Board's award of attorneys' fees to Intervenors, and because its decision to do so conflicts with that of other circuits.

1. The NLRA authorizes the Board to order any proper relief that would "effectuate the policies of [the Act]." *Bill Johnson's*, 461 U.S. at 747 (citing 29 U.S.C. §160(c)). In *Bill Johnson's*, this Court held, without qualification, that "the

---

[11] BE&K also vaguely suggests that the Sixth Circuit's holding on retaliation somehow conflicts with *Petrochem Insulation* and *Vanguard Tours*. *See* Pet. 14. That suggestion is simply wrong. *See Petrochem*, 240 F.3d at 32-34 (upholding Board's finding of retaliation based on the lack of merit of the company's suit and its decision to seek treble damages against the unions); *Vanguard Tours*, 981 F.2d at 65 (noting, without discussion, "there is little question that [the employer] had a retaliatory motive").

Board may order the employer to reimburse [those] whom he had wrongfully sued for their attorney's fees and other expenses." 461 U.S. at 747.

BE&K argues, however, that the Sixth Circuit ignored *Summit Valley Indus., Inc. v. Local 112, United Bhd. of Carpenters*, 456 U.S. 717 (1982)—decided before *Bill Johnson's*—which held that Section 303 of the LMRA is not a fee-shifting statute. Petitioner then suggests that, because a portion of its meritless suit was brought pursuant to Section 303, the Board cannot remedy BE&K's unfair labor practice by awarding Intervenors any of the attorneys' fees they incurred in defending against that lawsuit. Extending BE&K's argument to its logical conclusion, the Board could *never* award attorneys' fees against a party whose meritless and retaliatory lawsuit constituted an unfair labor practice unless that underlying suit was brought pursuant to a fee-shifting statute.

Petitioner's argument reflects its fundamental misunderstanding of the remedy ordered in this case. As Courts of Appeals have explained, no fee-shifting statute is necessary to justify an award of attorneys' fees pursuant to *Bill Johnson's* because "the award responds not to the Company's loss of its suit, but to the fact that the suit itself amounted to a 'illegal act.'" *Petrochem*, 240 F.3d at 35; *see also BE&K Constr. Co.*, 246 F.3d at 632.[12]

In this case, both the Board and the Sixth Circuit found, based on substantial evidence, that Petitioner's lawsuit was both meritless and retaliatory. Pet.App. 20a-22a; 5a-6a. As the Sixth Circuit noted, only an award of attorneys' fees could remedy the type of unfair labor practice committed by

[12] Petitioner also relies upon *J.P. Stevens*, 268 NLRB 8 (1983). But in that case, unlike here, the attorneys' fees at issue were not incurred in defending a lawsuit that itself constituted an unfair labor practice. *See J.P. Stevens & Co. v. NLRB*, 668 F.2d 767, 774-77 (4th Cir.), *vacated and remanded*, 458 U.S. 1118 (1982).

BE&K and act as a deterrent to the filing of additional meritless, retaliatory lawsuits. *BE&K Constr. Co.*, 246 F.3d at 632. And requiring Petitioner to pay attorneys' fees is hardly a novel remedy. *Cf.* 29 U.S.C. §107(e) (requiring payment of union's attorneys' fees if employer does not prevail in request for injunctive relief).[13]

2. The Sixth Circuit's enforcement of the Board's remedy does not conflict either with the Ninth Circuit's holding in the underlying litigation, *USS-POSCO*, *supra*, or with the Sixth Circuit's decision in *Johnson & Hardin*. As noted earlier, in *USS-POSCO* the Ninth Circuit reversed an award of Rule 11 sanctions against BE&K that was based on "its persistent reincorporation of stricken parts of the complaint in the amended complaints." 31 F.3d at 811. The propriety of Rule 11 sanctions against BE&K for allegedly ignoring the district court's order about future pleadings is totally irrelevant to the issue of whether the Board can award attorneys' fees as a remedy because BE&K's meritless and retaliatory lawsuit constituted an unfair labor practice. And, as discussed *supra*, the Sixth Circuit's unanimous decision in this case not to grant rehearing *en banc* makes it clear that there is no intra-circuit conflict between this case and *Johnson & Hardin*. *See* Pet.App. 22a, 26a.

[13] Notwithstanding the considerable hyperbole in the Petition, the award of attorneys' fees in this case does not "undercut vital First Amendment protections" or threaten anyone's "right of access to the courts on labor issues." Pet. 5. These statements totally ignore the second prong of the Bill Johnson's post-adjudication standard, *viz.* that a meritless lawsuit can constitute an unfair labor practice only if the Board, and the reviewing Court of Appeals, also conclude "that [it] was filed with retaliatory intent." *Bill Johnson's*, 461 U.S. at 749 (emphasis added).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

PETER D. NUSSBAUM*
MEERA TREHAN
ALTSHULER, BERZON, NUSSBAUM, RUBIN & DEMAIN
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

* Counsel of Record

Attorneys for Intervenors International Brotherhood of Electrical Workers, Local 302, AFL-CIO; and Local 342, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO

SANDRA RAE BENSON *
THEODORE FRANKLIN
VAN BOURG, WEINBERG, ROGER & ROSENFELD
180 Grand Avenue, 14th Floor
Oakland, CA 94512-3741
(510) 839-6600

Attorneys for Intervenors District Council of Iron Workers of the State of California and Vicinity, International Union of Bridge, Structural and Ornamental Iron Workers, AFL-CIO; Contra Costa County Building and Construction Trades Council, AFL-CIO; Northern California District Council of Laborers, Laborers International Union of North America; Bay Counties District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL-CIO;

Local Union No. 378, International Union of Bridge, Structural and Ornamental Iron Workers, AFL-CIO; Cement Masons Union Local No. 825, Operative Plasterers and Cement Masons International Association, AFL-CIO; and Local No. 549, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO

Supreme Court, U.S.
FILED
DEC 18 2001
CLERK

(5)

No. 01-518

IN THE
SUPREME COURT OF THE UNITED STATES

BE&K CONSTRUCTION CO.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit

---

PETITIONER'S REPLY BRIEF

Maurice Baskin
Counsel of Record for Petitioner
Venable, LLP
1201 New York Ave., N.W., Suite 1000
Washington, D.C. 20005
202-962-4800

11 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. The Opposing Briefs Have Failed to Justify the Board's Double Standard by Which First Amendment Protection is Being Denied to Suits Against Non-Employee Labor Organizations, in Direct Conflict With Holdings of This Court and the Courts of Appeals.....1

CONCLUSION.....7

TABLE OF AUTHORITIES

CASES

BE&K Construction Co. v. NLRB, 246 F. 3d 619 (6th Cir. 2001) ..... passim

BE&K Construction Co., 329 NLRB No. 68 (Sept. 30, 1999) ..... passim

Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983) ..... passim

Diamond Walnut Growers, Inc. v. NLRB, 53 F. 3d 1085 (9th Cir. 1995).....5

Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992) 2,5

NLRB v. Local 520, IUOE, 15 F. 3d 677 (7th Cir. 1994).....6

NLRB v. Vanguard Tours, Inc., 981 F. 2d 62 (2d Cir. 1992).....6

NLRB v. Yeshiva University, 444 U.S. 672 (1980) 6

Petrochem Insulation, Inc. v. NLRB, 240 F. 3d 26 (D.C. Cir. 2001) 4

Professional Real Estate Investors v. Columbia Pictures Industries, 508 U.S. 49 (1993)..... 1,3

Summit Valley Industries, Inc. v. United Brotherhood of Carpenters & Joiners, 456 U.S. 717 (1982)..... 6

USS-POSCO Ind. v. Contra Costa Cty. Bldg. and Const. Trades Council, 31 F. 3d 810 (9th Cir. 1994)..... passim

White v. Lee, 227 F. 3d 1214 (9th Cir. 2000)..... 4

STATUTES

29 U.S.C. §152.....5

29 U.S.C. § 157 4,5

29 U.S.C. § 158(a)(1) 4,5

29 U.S.C. § 187.....6

No. 01-518

IN THE
SUPREME COURT OF THE UNITED STATES

BE&K CONSTRUCTION CO.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For Writ of Certiorari To The
United States Court of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

PETITIONER'S REPLY

I. The Opposing Briefs Have Failed to Justify the Board's Double Standard by Which First Amendment Protection is Being Denied to Suits Against Non-Employee Labor Organizations, in Direct Conflict With Holdings of This Court and the Courts of Appeals.

In its Petition, BE&K has argued that the decisions of the NLRB and the Sixth Circuit depart from the plain language of this Court's holdings in *Professional Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49

(1993); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) and *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), by finding unlawful a non-frivolous lawsuit brought in good faith by an employer against non-employee labor organizations. As further demonstrated by the *amicus curiae* brief filed on behalf of the business community, the decisions below will have a demonstrable chilling effect on the ability of employers to petition the courts, absent reversal by this Court, because of the inherent uncertainty of all litigation. (Amicus Br. at 4, 8, 16). No employer will be able to seek judicial redress against labor unions without facing an unacceptable risk of violating the NLRA under the standard announced by the Board in this case.

The briefs in opposition to BE&K's Petition have misstated important principles of law and fact. If anything, they highlight the confusion and weakened constitutional protections engendered by the Board's misguided interpretation of this Court's holdings. It is necessary for the Court to grant the Petition in order to reconcile the conflicting holdings now surrounding employer-union litigation.

At the outset, the NLRB's brief appears to concede that the decisions below create a double standard never before contemplated by this Court in its holdings under the First Amendment. According to the opposing brief: "[W]hereas a plaintiff is insulated from antitrust liability for filing a suit so long as it had an objective basis for the suit (even if the litigant does not ultimately prevail), an employer is subject to liability for committing an unfair labor practice if its retaliatory suit fails." (NLRB Br. at 13). The Board's brief purports to justify such a distinction in labor law because of "the special economic dependency of employees on their employers." (Id.). Yet the present case does not involve a suit against employees, but involves only a suit against non-employee labor organizations.

There was no "economic dependency" at issue here. Rather, well-financed non-employee labor organizations initiated a campaign of attrition in judicial and administrative proceedings against BE&K for the purpose of interfering with the relationship between an innocent employer and its neutral customer. BE&K took the only steps it could take under the circumstances: it went to court to seek redress from the union attacks under the secondary boycott laws and the antitrust laws. BE&K was advised by legal experts that its suit had "merit," and the Petitioner at all times had an objective basis for litigating in defense of its business.

Under *Professional Real Estate Investors*, BE&K's suit was unquestionably protected by the First Amendment, even after it did not "prevail," because it was certainly not "objectively baseless." Indeed, the Ninth Circuit found that BE&K's suit raised "troubling" issues, and it was the *union defendants* who asked for time to consider filing a petition for rehearing due to their dissatisfaction with the Ninth Circuit's holding.[1]

The NLRB's opposition brief asserts myopically that the Board's finding of unlawfulness here does not "chill" employers because *Bill Johnson's* "ensures that the employer may file a non-frivolous lawsuit and have it adjudicated on the merits by the courts." (NLRB Br. at 14). As this Court recognized in *Professional Real Estate Investors*, however, businesses are entitled to more than just the right to "file" an antitrust suit under the First Amendment. They are also entitled at the *conclusion* of the litigation not to be second-

[1] The NLRB's brief wrongly states that Petitioner "does not question" the Board's application of *Bill Johnson's* to federal, as opposed to state, litigation. (NLRB Br. at 10, n.2). To the contrary, BE&K has directly opposed the Board's expansion of *Bill Johnson's* to litigation sanctioned by the antitrust laws and the secondary boycott laws, at every stage of this case, including the Petition to this Court. (See, e.g., Pet. at 4-5, 17).

guessed as to their motives for filing legal action, provided that their suit has "merit" in the sense of not being "objectively baseless." It is this standard of protection which is completely overridden by the Board's misinterpretation of *Bill Johnson's Restaurants. See White v. Lee*, 227 F. 3d 1214, 1235-36 (9th Cir. 2000); *Petrochem Insulation, Inc. v. NLRB*, 240 F. 3d 26, 27 (D.C. Cir. 2001), cert. den., No. 01-92 (Oct. 29, 2001).[2]

Closely intertwined with the Board's misapplication of *Bill Johnson's* First Amendment standard is the Board's (and the Sixth Circuit's) discounting of the distinction between suits against employees and suits against unions. Contrary to the opposition briefs, *Lechmere, Inc. v. NLRB, supra*, established beyond peradventure that Sections 7 and 8 of the NLRA codify a fundamental distinction between employees and labor organizations. Employees have rights that labor organizations do not have, and employees are entitled to protections which simply do not apply to labor organizations.

The opposition briefs deliberately ignore the basic lessons of *Lechmere* and the plain language of *Bill Johnson's* in order to support the Board's decision below. First, the Board's brief misleadingly cites *Bill Johnson's* as holding that it is an unfair labor practice for an employer "to prosecute an unmeritorious lawsuit for a retaliatory purpose." (NLRB Br. at 2). *Bill Johnson's* does not so hold. Instead, the

[2] The opposing briefs assert that this Court's denial of the petition for writ of certiorari in *Petrochem* should control the outcome here. (NLRB Br. at 9). The business community disagrees, having chosen to file an amicus brief in support of BE&K, while not supporting *Petrochem*, (Amicus Br. at 13). Certainly, the present petition raises important legal issues in a much more compelling factual setting than did *Petrochem*. In the latter case, the employer's litigation was "charitably" characterized by the reviewing court as "utterly meritless," whereas BE&K's suit was found by the Ninth Circuit to have an objective basis and to raise "troubling" issues.

Court declared unequivocally that an employer could commit an unfair labor practice only by prosecuting an unmeritorious lawsuit for a retaliatory purpose against "*employees*." 461 U.S. at 731, 740, 744. The Court was careful to refer only to suits against "employees" throughout its opinion, and at no time did the Court state or imply that a suit against a non-employee labor organization constituted an unfair labor practice.[3]

Nor do the opposing briefs in this case reconcile the decisions below with the plain language of Section 8(a)(1) of the Act. This Court has *never* held that an employer can violate the Act's prohibition against interference with "employee" rights solely by taking an action against a non-employee labor organization. To so hold ignores the careful definitions of employees and labor organizations under the NLRA, as this Court plainly held in *Lechmere*. *See* 29 U.S.C. 152(3) and 152(5). Thus, contrary to the opposing briefs, the Sixth Circuit holding directly conflicts with the Ninth Circuit's reading of *Lechmere* as expressed in *Diamond Walnut Growers, Inc. v. NLRB*, 53 F. 3d 1085 (9th Cir. 1995).

The Board's answer to *Lechmere* asserts that the Court's holding there was somehow limited to trespass cases. (NLRB Br. at 14). But this Court did not so limit its holding in *Lechmere*, nor does Section 7 itself anywhere distinguish between trespass actions and other forums to which the Act applies. Rather, the Court unequivocally held that Section 7 does not apply to non-employee "union organizers." Likewise, Section 8(a)(1) does not prohibit interference with the rights of "labor organizations (except in trespass actions)." Instead Section 8(a)(1) does not give rights to labor

[3] The *amicus curiae* brief correctly points out the numerous times that the Bill Johnson's court limited its holding to suits against "employees." (Amicus Br. at 19, n. 8). Neither of the opposing briefs identifies any aspect of *Bill Johnson's* in which this Court ever extended its holding to non-employee labor organizations.

organizations at all, but only prohibits interference with the rights of "employees."

The opposition briefs also wrongly attempt to gloss over the severely defective nature of the findings below on the question of retaliatory motivation. (NLRB Br. at 17-18; U. Br. at 12). The NLRB brief does not address at all the unauthorized nature of the rationale adopted by the Sixth Circuit, which did not appear in the Board's analysis. The Union Intervenors incorrectly attempt to distinguish this Court's holding in *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980), which plainly prohibits the courts from adopting rationales not set forth in NLRB opinions. Clearly, in the present case, the Sixth Circuit found wanting the NLRB's stated legal justification for finding unlawful motivation on the part of BE&K. The court therefore improperly substituted a new legal justification of its own, in a manner which further conflicts with federal antitrust laws. This Court's review is essential in order to clarify how retaliatory motivation should properly be identified after litigation concludes in the labor context.[4]

Finally, the opposition briefs misstate the holding of *Summit Valley Indus., Inc. v. Local 112, United Bhd. of Carpenters*, 456 U.S. 717 (1982). (NLRB Br. at 19-20; U. Br. at14). Contrary to their arguments, the result in the present case directly conflicts with this Court's prior holding that prevailing parties under Section 303 of the Labor Management Relations Act should not be awarded attorneys fees.

---

[4] The opposing briefs fail to explain away the direct conflicts between the Sixth Circuit findings of retaliatory motive and the contrary holdings of *NLRB v. Local 520, IUOE*, 15 F. 3d 677, 680 (7th Cir. 1994); and *NLRB v. Vanguard Tours, Inc.*, 981 F. 2d 62, 65 (2d Cir. 1992). Both of those cases refused to permit the NLRB to find retaliatory motivation primarily on the basis of an employer's failure to prevail in litigation.

Thus, notwithstanding the claims made by the opposing briefs, BE&K's petition raises significant issues of great importance which call for resolution by this Court. In the words of the amicus curiae brief, the NLRB and Sixth Circuit decisions "emasculate employer rights preserved under the Act and the First Amendment right to Petition the Courts for redress of grievances." (Amicus Br. at 3). Review by this Court is essential to resolve the conflicting legal principles raised by the decisions below.

CONCLUSION

For the reasons set forth above and in BE&K's Petition, the decisions of the Sixth Circuit and the NLRB present direct conflicts with holdings of this Court and other courts on issues of great importance. The Court should grant the writ of certiorari.

Respectfully submitted,

Maurice Baskin
Venable, LLP
1201 New York Ave., N.W.,
Suite 1000
Washington, D.C. 20005
202-962-4800

Counsel of Record for Petitioner BE&K

Supreme Court, U.S.
FILED
DEC 5 2001
CLERK

(3)

No. 01-518

IN THE
Supreme Court of the United States
OCTOBER TERM, 2001

BE&K CONSTRUCTION CO.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES AND ASSOCIATED BUILDERS AND CONTRACTORS, INC. IN SUPPORT OF PETITIONER

MICHAEL E. AVAKIAN*
SMETANA & AVAKIAN
5211 Port Royal Road, Ste. 103
Springfield, VA 22151
(703) 321-9181

Attorney for *Amicus Curiae*
**Counsel of Record*

32 pp

Of Counsel:
Stephen A. Bokat
Robin S. Conrad
Joshua A. Ulman
NATIONAL CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Attorneys for *Amicus Curiae*
Chamber of Commerce of
the United States

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

INTEREST OF *AMICI CURIAE* 2

ISSUES 3

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 4

REASONS FOR GRANTING THE PETITION 6

I. ABSENT REVIEW BY THIS COURT, THE DECISIONS BELOW THREATEN TO CHILL FUNDAMENTAL EMPLOYER RIGHTS OF ACCESS TO THE COURTS DUE TO CONFLICTING STANDARDS USED TO DETERMINE WHETHER BUSINESS LAWSUITS ARE "MERITORIOUS." 6

II. REVIEW SHOULD ALSO BE GRANTED IN ORDER TO RESOLVE THE CIRCUIT CONFLICT WHICH NOW EXISTS REGARDING THE BOARD'S POWER TO AWARD ATTORNEYS' FEES TO NON-EMPLOYEE LABOR ORGANIZATIONS 16

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Page

American Pacific Concrete Pipe,
292 N.L.R.B. 1264 (1989) 22

B.E.&K Construction Co.,
329 N.L.R.B. No. 68 (1999) 2

Bill Johnson's Restaurants v. NLRB,
461 U.S. 731 (1983) . . . . . *in passim*

Brown & Root, Inc. v. Louisiana State AFL-CIO,
10 F.3d 316 (5th Cir. 1994) 14

California Motor Transport Co. v. Trucking Unlimited,
404 U.S. 508 (1972) 8-10

Chauffeurs, Teamsters, Local 776 v. NLRB,
973 F.2d 230 (3d Cir. 1992) 15

Diamond Walnut Growers, Inc. v. NLRB,
53 F.3d 1085 (9th Cir. 1995) 16, 17

Dist. 65, Distributive Workers v. NLRB,
683 F.2d 1155 (D.C. Cir. 1978) 21

East Bay Chevrolet v. NLRB,
659 F.2d 1006 (9th Cir. 1981) 21

Eastern R. Presidents Conf. v. Noerr Motor Freight, Inc.,
365 U.S. 127 (1961) 14

Federal Prescription Service, Inc. v. NLRB,
496 F.2d 813 (8th Cir. 1974) 21-22

Federal Security, Inc.,
336 N.L.R.B. No. 52 (2001) 22

Gibson Greetings, Inc. v. NLRB,
53 F.3d 385 (D.C. Cir. 1995) 17

IBEW, Local 532 (Brink Constr. Co.),
291 N.L.R.B. 437, 438 (1988) 22

Hecks, Inc.,
215 N.L.R.B. No. 142 (1974) 18, 21

Heisler Food Enter., Ltd.,
Case No. 2-CA-30899, 1999 NLRB LEXIS 889 (1999) . 22-23

International Union of Electrical Workers v. NLRB,
502 F.2d 349 (D.C. Cir. 1974) 17

J.P. Stevens & Co. v. NLRB,
612 F.2d 881 (4th Cir. 1980) 21

Johnson & Hardin Co.,
305 N.L.R.B. 690 (1991) 16

Johnson & Hardin Co. v. NLRB,
49 F.3d 237 (6th Cir. 1995) 23

Lang Towing, Inc.,
201 N.L.R.B. No. 92 (1973) 17

Lechmere, Inc. v. NLRB,
502 U.S. 527 (1992) 5, 17, 20

Linn v. United Plant Guard Workers, Local 114,
383 U.S. 53 (1966) 7, 11

Local 32B-32J, Service Employees Int'l Union,
68 F.3d 490 (D.C. Cir. 1995) 23

Martin v. Gingerbread House, Inc.,
977 F.2d 1405 (10th Cir. 1992) 14

McDonald v. Smith,
472 U.S. 479 (1985) 10

Mine Workers v. Pennington,
381 U.S. 657 (1965) 14

Montgomery Ward Co.,
288 N.L.R.B. 126 (1988) 20

NLRB v. Federal Security, Inc.,
154 F.3d 751 (7th Cir. 1998) 22

NLRB v. Food Store Empl., Local 347,
417 U.S. 1 (1974) 20

NLRB v. Vanguard Tours, Inc.,
981 F.2d 62 (3d Cir. 1992) 9

Petrochem Insulation, Inc. v. NLRB,
240 F.3d 26, 32 (D.C. Cir. 2001) 13

Power Systems,
239 N.L.R.B. 445 (1978) 19

Professional Real Estate Investors, Inc. v.
Columbia Pictures Ind., Inc.,
508 U.S. 49 (1993) 4, 7, 9, 10, 13

San Filippo v. Bongiovanni,
30 F.3d 424 (3d Cir. 1994) 14

Shepard v. NLRB,
459 U.S. 344 (1983) 21

Summitville Tiles, Inc.,
300 N.L.R.B. 64 (1990) 15

Summit Valley Industries, Inc. v.
United Brotherhood of Carpenters & Joiners,
456 U.S. 17 (1982) 6, 19

Sure-Tan, Inc. v. NLRB,
467 U.S. 883 (1984) 9

Teamsters Local 776 (Rite Aid Corp.),
305 N.L.R.B. 832 (1991) 23

Teamsters, Local 776 v. NLRB,
973 F.2d 230, 236 (3d Cir. 1992) 23

Three Affiliated Tribes v. Wold Engineering, P.C.,
476 U.S. 877 (1986) 9

Tiidee Products, Inc.,
194 N.L.R.B. 1234 (1972) 4, 17, 20, 21, 23

USS Posco v.
Contra Costa County Bldg. & Constr. Trades Council,
31 F.3d 800 (9th Cir. 1994) 12, 14

Unbelievable, Inc.,
318 N.L.R.B. 857 (1995) 21, 22

United Steelworkers of Amer. v. NLRB,
496 F.2d 1342 (5th Cir. 1974) 21

NLRB v. Vanguard Tours, Inc.,
981 F.2d 62 (2d Cir. 1992) 15

White v. Lee,
227 F.3d 1214 (9th Cir. 2000) 12

OTHER

Balmer, *Sham Litigation and the Antitrust Laws*,
29 Buffalo L.Rev. 39 (1980) 12
Fed R. Civ. Proc 11. 16
28 U.S.C. § 1927 16

No. 01-518

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

BE&K CONSTRUCTION CO.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INTRODUCTION

Pursuant to Supreme Court Rule 37.2(a), the Chamber of Commerce of the United States and the Associated Builders and Contractors, Inc. submit this joint brief as *amici curiae* in support of the Petitioner. All parties have given written consent to the filing of this Brief.[1]

---

[1]Letters of consent have been filed with the Clerk of Court. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that this brief was not prepared, written or produced by any person or entity other than the *amici curiae* or its counsel.

INTEREST OF *AMICI CURIAE*

The *amici curiae* Chamber of Commerce of the United States (the "Chamber") and Associated Builders and Contractors, Inc. ("ABC") are, respectively, a federation of businesses and a trade association. They are filing this brief because of their mutual concern that the Decisions of the National Labor Relations Board (the "Board") and the Court of Appeals conflict with prior holdings of this Court on an issue of great importance: the First Amendment protection attaching to lawsuits filed by employers against labor organizations. The individual *amici* and their specific individual interests in this case are set forth below.

The Chamber is the world's largest federation of business companies and associations, with an underlying membership of nearly 3,000,000 businesses and professional organizations of every size, in every industry sector, and every region of the country. An important function of the Chamber is to represent the interests of its members by filing briefs *amicus curiae* in cases involving issues of concern to American business.

ABC is an association of more than 23,000 construction contractors and related firms. ABC members are regularly confronted by activities of labor organizations and their agents intent on removing them from both bidding on and performing private and governmental construction projects. Its members have a fundamental business interest in their business reputations and in protecting their businesses from competitors' anti-competitive activities.

The *amici* jointly believe that the legal issues under review herein are extremely important to employers

throughout the nation. The Board's decision here in *B.E.&K Construction Co.*, 329 N.L.R.B. No. 68 (1999), *enf'd*, 246 F.3d 619 (6th Cir. 2001), imposes a burden on employers under the National Labor Relations Act (the "Act") that emasculates employer rights preserved under the Act and under the First Amendment right to Petition the Courts for redress of grievances.

The Chamber's and ABC's participation as *amici curiae* will assist the Court in obtaining full consideration of the public-interest issues.

ISSUES

The *amici* hereby adopt and incorporate by reference the Petitioner's Questions Presented.

STATEMENT OF THE CASE

The *amici* hereby adopt and incorporate by reference the Petitioner's Statement of the Case.

The *amici* wish to stress that the Petitioner in this case filed suit against the unions only after its business had been attacked in a series of frivolous legal actions by the labor organizations. Even then, the Petitioner did not bring its antitrust claims until after consulting with numerous legal experts who advised that the claims had merit and should be pursued. In short, it is undisputed that BE&K filed its suit based upon a good faith belief that its claims had merit, and there has been no finding by the NLRB or the Circuit Court that BE&K's were "objectively baseless."

It must also be noted that BE&K did not file any litigation against its own employees or against employees of any other employer. BE&K solely took legal action against labor organizations who themselves had initiated legal proceedings against BE&K and its customer in the first instance. There is no dispute that the unions did not represent BE&K's employees and did not act on their behalf at any point in the proceedings.

SUMMARY OF ARGUMENT

The Petition presents a circuit court conflict concerning an issue of great public importance: whether the First Amendment will any longer protect the right of employers to petition the courts against non-employee labor organizations. The decisions of the NLRB and the Sixth Circuit, by misapplying the Court's holding in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), threaten to chill the business community's right of access to the courts due to the unavoidable risk of committing unfair labor practices under the newly announced standard.

The Board and court of appeals have improperly departed from the uniform standard established by the Court in *Professional Real Estate Investors, Inc. v. Columbia Pictures Ind., Inc.*, 508 U.S. 49, 51 (1993), under which the First Amendment protects all, but "objectively baseless" litigation. That departure conflicts with decisions in the Second, Third, Fifth, and Ninth Circuits.

As demonstrated in the Petition, the Board has abandoned the practice of evaluating the *bona fides* of an

employer's lawsuit upon objective considerations at the time the suit is filed, by erecting a rule that every lawsuit lost is an unfair labor practice. This Court's approach in *Professional Real Estate Investors, Inc.*, established "that litigation cannot be deprived of immunity as a sham unless the litigation is objectively baseless." 508 U.S. at 51.

Employers filing suit under the Board's "prevailing" test, as employed against the Petitioner in this case, will be unable to determine whether or not litigation is permissible under the Act. If BE&K's suit is unlawful, though filed and maintained with the support of expert advice and in defense of plainly improper non-employee conduct, then every employer lawsuit against a labor organization is a potential unfair labor practice.

The chilling effect of the Board and circuit decisions is compounded by their conflict with this Court's holding in *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992), where the Court established that important distinctions exist between employees and labor organizations: "§ 7 simply does not protect nonemployee union organizers." BE&K here did not sue its own employees. Rather, it treated the non-certified, non-employee labor organizations in the same manner it would treat unlawful action of a competitor damaging its business.

Moreover, the Board's new policy departs from instructions given the Board by this Court in *NLRB v. Food Store Empl., Local 347*, 417 U.S. 1 (1974), where the Board's *Tiidee Products, Inc.*, 194 N.L.R.B. 1234 (1972), case was considered and the Board on remand determined that unless "patently frivolous defenses" are

asserted or the employer's defenses "are debatable," then attorneys' fees should not be awarded. *Heck's, Inc.*, 215 N.L.R.B. No. 142 (1974). Certainly, they should not be awarded where the employer's underlying action has been filed under Section 303 of the LMRA. *Summit Valley Industries, Inc. v. United Brotherhood of Carpenters & Joiners*, 456 U.S. 717 (1982).

Absent review by this Court, the amici are greatly concerned that the balance of labor relations will be undermined by the decisions below, as non-employee labor organizations are free to attack legitimate businesses, while those employers who believe in good faith that they have valid claims against union misconduct are nevertheless afraid to petition the courts in their own defense.

For these reasons, the Petition should be granted.

REASONS FOR GRANTING THE PETITION

I.
ABSENT REVIEW BY THIS COURT, THE DECISIONS BELOW THREATEN TO CHILL FUNDAMENTAL EMPLOYER RIGHTS OF ACCESS TO THE COURTS DUE TO CONFLICTING STANDARDS USED TO DETERMINE WHETHER BUSINESS LAWSUITS ARE "MERITORIOUS."

In 1983, this Court fashioned a balancing test to determine when the National Labor Relations Board ("Board") may enjoin a private state court lawsuit

because the suit itself constitutes the commission of an unfair labor practice and when the Board might find an unsuccessful lawsuit to be retaliatory in violation of the Labor Act. *See Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983). At the same time, the Court affirmatively established, however, that "an employer has the right to seek local judicial protection from tortious conduct during a labor dispute." *Id.* at 742.[2]

In the decisions below, *amici* assert that the Board and the Court of Appeals distorted the intent and purpose of the Court's deliberate restrictions on the Board's jurisdiction to condemn lawsuits to be retaliatory unfair labor practices under the Act. In doing so, they have set up an almost impossible regime for employers to follow to protect their business interests.

That regime, simply stated, finds employer lawsuits against labor organizations to be unfair labor practices if the employer does not "prevail," regardless of the employer's good faith in filing suit and regardless of the objective "merit" of the litigation. This is an unwarranted expansion of the holding in *Bill Johnson's Restaurants* that completely disregards this Court's extension of First Amendment protection to all but "sham" litigation, in the cases of *Professional Real Estate*

---

[2]In *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966), the court had held that the state tort of libel was not preempted by the Labor Act. Neither are secondary boycotts or Sherman antitrust claims preempted by the Labor Act. See *Summit Valley Industries, Inc. v. United Brotherhood of Carpenters & Joiners*, 456 U.S. 17 (1982); *Mine Workers v. Pennington*, 381 U.S. 657, 669 (1965).

Investors, Inc. v. Columbia Pictures Ind., Inc., 508 U.S. 49 (1993), and *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

By establishing a regime that discounts employers' First Amendment rights, the Board and the Court of Appeals threatened the entire business community's right of access to the courts to challenge potentially unlawful activity conducted by labor organizations. No employer can tell in advance of litigation whether a suit against a union will or will not be found to be an unfair labor practice.

Under the Board's standard, the only way to avoid an unfair labor practice finding is not to file suit, no matter how valid the employer believes its claim to be. This newly formulated Board caselaw adversely burdens and chills all employers' First Amendment rights to petition the government for redress of grievances. The *amici* urge the Court to grant Certiorari in order to prevent this chilling effect and to re-establish a single, uniform "sham" litigation standard.

Uniform standards under the First Amendment assure predictability and certainty to all litigants. As this Court affirmed in *Bill Johnson's Restaurants*, "weighty countervailing considerations...militate against allowing the Board to condemn the filing of a suit as an unfair labor practice and to enjoin its prosecution." 461 U.S. at 731. These considerations include "the right of access" to the state courts to seek redress of grievances, the preservation of domestic peace, and the substantial state interest in protecting the health and well-being of its

citizens. *Id.* at 742. *Three Affiliated Tribes v. Wold Engineering, P.C.*, 476 U.S. 877, 888 (1986).

Furthermore, the Court observed in *Bill Johnson's Restaurants* that the right of access to the courts was recognized to "stand apart" from other forms of action because it is a protected "aspect of the First Amendment right to petition the Government for redress of grievances." 461 U.S. at 741. That right, the Court explained "is too important to be called an unfair labor practice solely on the ground that what is sought in the court is to enjoin employees from exercising a protected right." *Id* (emphasis added). Of course, here, the record shows that BE&K has not sought to enjoin any of its employees from exercising any right they may have.

This Court also showed in *Bill Johnson's Restaurants* that the proper manner for the Board to obtain jurisdiction after the state court case had concluded, required it to demonstrate that the state case was both improperly motivated and lacked a reasonable basis in fact or law. It explained the lack of reasonable basis in the First Amendment context to occur "when litigation is based on intentional falsehoods or on knowingly false claims." *Bill Johnson's Restaurants*, 461 U.S. at 743. This is itself the "sham" exception previously outlined from the Court's decision in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), which the Court explained in *Professional Real Estate Investors*, 508 U.S. at 57, that in *California Motor Transport Co.* "we extended *Noerr* to 'the approach of citizens...to administrative agencies...and to courts.'"

In *California Motor Transport*, this Court recognized that the First Amendment guarantee of a right to petition the government for a redress of grievances includes the right of access to the courts: "The right of access to the courts is indeed but one aspect of the right of petition." *Also McDonald v. Smith*, 472 U.S. 479, 482 (1985) ("The right to petition is cut from the same cloth as the other guarantees of [the First] Amendment...."). In *Professional Real Estate Investors*, this Court reaffirmed the "sham" litigation standard ten years after *Bill Johnson's Restaurants*, without any indication that *Bill Johnson's Restaurants* was intended to create an anomalous labor law exception to the otherwise uniform application of the First Amendment established by the Court.

Yet, in the cases now before the Court, the Board and the Court of Appeals, relying on unclear dicta from *Bill Johnson's Restaurants*, have ignored Petitioner BE&K's good faith belief in the merit of its lawsuit and ruled against BE&K without any finding that the suit was "objectively baseless." Indeed, the record shows that BE&K consulted with numerous antitrust experts prior to filing its claims, and those experts advised that BE&K's case against the unions had merit.[3]

---

[3]The Court in *Professional Real Estate Investors*, viewed its test as similar to considerations undertaken in a tort for malicious prosecution. 508 U.S. at 63. It also believed that what the underlying court thinks of the lawsuit was important, especially "in light of the unsettled condition of the law, Columbia plainly had probable cause to sue....or at the very least...an objectively 'good faith argument for the extension, modification, or reversal of (continued...)

The lawsuit was therefore not a "knee-jerk" reaction to alleged Section 7 rights the labor organizations possessed. The rulings below create an unwarranted anomalous labor exception to access to the courts, one where the First Amendment protections are now nonexistent for non-prevailing plaintiffs.

Amici submit, however, that it is simply not enough for the Board to undertake an "academic" review of the record to reach self-fulfilling conclusions of law in order to condemn as an unfair labor practice any act to petition the government for redress of grievances. When that same government, through the federal judiciary, denies relief to a litigant, efforts undertaken by another federal arm of the government—such as the Board here—to punish plaintiff for bringing the case must be denied unless the litigation is shown to be objectively baseless. For any government functionary to punish a citizen/petitioner for exercising a fundamental constitutional right must be subject to the highest level of scrutiny, not the lowest.

Thirty years ago this Court in *Linn* provided labor organizations with fair warning that they were to be treated as functional entities who were not privileged to engage in reckless actions free from legal sanction: "[a]fter all, *the labor movement* has grown up and *must assume ordinary responsibilities*." *Linn*, 383 U.S. at 63 (emphasis added).

---

[3](...continued)
existing law'" under Fed R. Civ. Proc. 11. *Id.* at 65.

It is paradoxical to attempt to hold labor unions subject to "ordinary responsibilities" and to continue to grant them immunity and privileges when their actions might facially amount to tortious activity. The failure to consider the importance of First Amendment access in the context of whether intentional falsehoods or knowingly frivolous administrative claims were asserted, as occurred here, is underscored by the Court's quotation in *Bill Johnson's Restaurants* from Balmer, *Sham Litigation and the Antitrust Laws*, 29 Buffalo L.Rev. 39, 60 (1980), to support the proposition that the same balancing approach taken by this Court under the antitrust laws should be followed under the Labor Act.[4]

Importantly, the *Bill Johnson's Restaurant* Court ruled that "[w]e should follow a similar course under the NLRA." 461 U.S. at 744.

The District of Columbia Circuit has recognized this conflict and called upon this Court to "one day create a uniform standard for sham litigation governing both NLRA and non-NLRA cases (or explain why the First

[4]The Ninth Circuit recently so observed in *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000), a case raised by Petitioner BE&K, where HUD sought similar fees as a statutory remedy against homeowners filing a state court lawsuit to prevent issuance of a use permit for homeless housing. The court found that the claim would "conflict with our prior case law which protects the First Amendment right of citizens to engage in petitioning activity, including the filing of lawsuits with an objective basis in fact or law, even if they ultimately prove unsuccessful." *Id.* at 1236. There is no reason supplied by the Sixth Circuit why uniformity should not apply to all federal agency enforcement statutes.

Amendment protects erring litigants less in the NLRA context than others)." *Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26, 32 (D.C. Cir. 2001). That day has now arrived.[5]

However unclear the Court's language in *Bill Johnson's Restaurants* may have been in identifying "suits based on insubstantial claims" not entitled to protection, 461 U.S. at 731, the Sixth Circuit's position clearly sets itself against this Court's explanation in *Real Estate Investors, Inc. v. Columbia Pictures Ind., Inc.*, 508 U.S. 49 (1993).

In *Professional Real Estate Investors*, the Court resolved that the "sham" exception turns on the objective intent of the filer and included *Bill Johnson's Restaurants* in its legal overview of how the "sham" exception applies in "other contexts." 508 U.S. at 58. That case defined a two-part analysis where "[f]irst, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Id* at 60. If so, then the reviewing court could examine the subjective motivation of the litigant focused on whether

[5]The facts of the present petition stand in stark contrast to the litigation found to be "frivolous" by the D.C. Circuit in *Petrochem Insulation, Inc.*, 240 F. 3d at 31. Whereas in *Petrochem*, the employer "failed to identify a single meritless objection to any construction project" made by the unions against it, BE&K identified fourteen meritless legal actions taken against it by the unions in the USS-POSCO litigation. *See USS POSCO v. Contra Costa County Bldg. & Constr. Trades Council*, 31 F. 3d 800, 804 (9th Cir. 1994).

the baseless lawsuit attempts to directly interfere with the opponent's business. *Id.*

Specifically, the Court viewed its line of decisions as demonstrating that "[w]e regard as sham 'private action that is not genuinely aimed at procuring favorable government action' as opposed to 'a valid effort to influence government action.'" 508 U.S. at 58. It also demonstrated the force of its ruling by stating that "we have repeatedly reaffirmed that evidence of anti-competitive intent or purpose alone cannot transform otherwise legitimate activity into a sham." *Id.* At 59.

The Sixth Circuit's rejection of the "sham" principle also places it in conflict with the decisions of the Ninth Circuit in *USS Posco v. Contra Costa County Bldg. & Constr. Trades Council*, 31 F.3d 800, 804 (9th Cir. 1994), stating that this Court in *Bill Johnson's Restaurant* was "applying *Noerr-Pennington* to [the] labor context;" the Third Circuit in *San Filippo v. Bongiovanni*, 30 F.3d 424, 429 (3d Cir. 1994), where "the unprotected status of 'sham litigation;'" was recognized "in construing the NLRA in the present context;" and the Fifth Circuit in *Brown & Root, Inc. v. Louisiana State AFL-CIO*, 10 F.3d 316, 325 (5th Cir. 1994), where that Court stated that in *Bill Johnson's Restaurants*, this "Court proceeded to input the sham exception to the *Noerr-Pennington* doctrine into labor law."[6] Unlike the decision in *BE&K v. NLRB* here, these three circuits did apply the *Professional Real Estate*

[6]*Eastern R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *Mine Workers v. Pennington*, 381 U.S. 657, 669 (1965).

Investors "baseless" test, *i.e.*, no realistic chance of success on the merits, to their individual situations.[7]

As the Third Circuit observed in *Chauffeur, Teamsters, Local 776 v. NLRB*, 973 F.2d 230, 235 (3d Cir. 1992), the right of access to the courts is a "more significant consideration" than the potential that a lawsuit may be a powerful instrument of coercion. The Sixth Circuit's analysis unwinds the Court's *Bill Johnson's Restaurants* national standard and directly conflicts with the Court's fundamental conclusion that the use of a lawsuit for coercive purposes *is proper* so long as the lawsuit is *not baseless*.

This structure is also consistent with *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62 (2d Cir. 1992). There, the Second Circuit held the Board to the *Bill Johnson's Restaurants* requirement to identify disputed issues of fact or law and rejected the Board's automatic finding of lack of reasonable basis from an unsuccessful verdict (a settlement) in favor of the employer: "We think the better reading, however, requires the Board to find that the withdrawn suit lacked a reasonable basis in fact or law." *See Summitville Tiles, Inc.*, 300 N.L.R.B. 64, 65 (1990) (Board previously recognized "both essential prerequisites to enjoin prosecution of a state court lawsuit"; company conceded retaliatory motive).

[7]*Also Martin v. Gingerbread House, Inc.*, 977 F.2d 1405, 1407 (10th Cir. 1992), identified the "baseless test" in *Bill Johnson's Restaurants* to exist where "controlling federal law bars the plaintiff's right to relief, ... clear state law makes the case frivolous, or ... no reasonable jury could [find] in favor of the plaintiff." 461 U.S. at 754-55 (Brennan, J., concurring).

Further, intrusion by the Board in second guessing federal court litigation results requires review. Because the federal courts retain the inherent power to monitor and reprimand parties before them under Fed. R. Civ. Proc. 11 and 28 U.S.C. § 1927, if the court has jurisdiction of statutory violations of Section 8(b)(4) of the Act under 29 U.S.C. § 187, its refusal to impose sanctions with due respect for the employer's constitutional rights, must not be relooked at by the Board as it construes the same statute.

II.
REVIEW SHOULD ALSO BE GRANTED IN ORDER TO RESOLVE THE CIRCUIT CONFLICT WHICH NOW EXISTS REGARDING THE BOARD'S POWER TO AWARD ATTORNEYS' FEES TO NON-EMPLOYEE LABOR ORGANIZATIONS.

The chilling effect of the Board's decision in the present case is compounded by the fact that the Board has expanded the scope of *Bill Johnson's Restaurants* beyond its intended employee beneficiaries. The Sixth Circuit has endorsed the Labor Board's exercise of authority to award costs and attorneys' fees to uncertified non-employee labor organizations and has done so in a summary manner without fair consideration of the employer's non-retaliatory motives. The holdings of the Board and the Court of Appeals are wrong and must be reversed to prevent considerable harm to the balance of interests in labor relations throughout the country.

The Sixth Circuit's order conflicts with the Ninth Circuit's reasoning in *Diamond Walnut Growers, Inc. v.*

NLRB, 53 F.3d 1085 (9th Cir. 1995), and with the Sixth Circuit's own views expressed previously in *Johnson & Hardin Co. v. NLRB*, 49 F.3d 237, 244 (6th Cir. 1995). Overriding each of these decisions is this Court's plain holding in *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992) ("§ 7 simply does not protect nonemployee union organizers.").

In *Diamond Walnut* the employer had sued a union that represented its striking employees along with another union that actually issued an allegedly defamatory letter. 53 F.3d at 1089. Similarly, in *Gibson Greeting v. NLRB*, 53 F.3d 385 (D.C. Cir. 1993), the Court denied a certified union's cross-petition alleging that the Board had erred by failing to award it attorneys' fees and costs under its winning § 8(a)(5) charge, for expenses incurred where the employer did not prevail in a section 301, 29 U.S.C. § 185, lawsuit filed for breach of the collective bargaining agreement. In *Gibson Greeting*, the Board did not consider "whether the employer's claims were made in bad faith." 53 F.3d at 394. The Sixth Circuit's expansive ruling is not supported by these two cases.

The traditional test for an attorneys' fee award under Board law was set forth in *Tiidee Products, Inc.*, 194 N.L.R.B. 1234 (1972), *enf'd mod. International Union of Electrical Workers v. NLRB*, 502 F.2d 349 (D.C. Cir. 1974), *cert. denied*, 417 U.S. 921 (1974). In *Tiidee Products*, a company was ordered to pay litigation costs associated with the NLRB proceeding due to the company's "clear and flagrant violation of the law" to discourage "future frivolous litigation." *Id.* *See also Lang Towing, Inc.*, 201 N.L.R.B. No. 92 (1973) (setting

forth a "frivolous" defense standard); *Heck's, Inc.*, 215 N.L.R.B. No. 142 (1974) (affirming frivolous defense standard).

In *Bill Johnson's Restaurants*, 461 U.S. at 747 (emphasis added), this Court set forth the following attorneys' fees standard:

> The employer's [civil] suit having proved unmeritorious, the Board would be warranted in taking that fact into account in determining whether the suit had been filed in retaliation for the exercise of the *employee's* Section 7 rights. If a violation is found, the Board may order the employer to reimburse the *employees* whom he had wrongfully sued for their attorneys' fees and other expenses. (Emphasis added).

Thus, the Court based its civil lawsuit/attorney's fee grant of authority on an anticipated finding of "employer retaliation" against its own employees, including but not limited to whether the civil suit had merit. The Court concluded "it is an enjoinable unfair labor practice to prosecute a baseless lawsuit with the intent of retaliating against an employee for the exercise of rights protected by § 7 of the NLRA." 461 U.S. at 744 (emphasis added).

Notably, in *Bill Johnson's Restaurants*, the employer did not sue any union, but instead sued eight of its own employees.[8]

In ordering BE&K to pay the union's fees and costs here, the Board ruled that the order is appropriate even though the lawsuit included causes of action which were not preempted and which might have constituted a reasonable basis for a damage suit before the Federal district court under Section 303 of the Act. This holding directly conflicts with this Court's decision in *Summit Valley Industries, Inc. v. United Brotherhood of Carpenters & Joiners*, 456 U.S. 17 (1982) (prohibiting an award of attorneys fees for filing a non-prevailing suit against a union under Section 303 of the LMRA).

The Sixth Circuit expressed an unfounded concern over creating an anomaly in the law by permitting suits against unions which would not have been permissible if undertaken against employee union members. The appeals court's resulting holding departs from the law enacted by Congress (and so interpreted by this Court), which plainly

---

[8]The key ingredient in *Bill Johnson's Restaurants* was the defendant employees' status. This theme is repeated throughout the Court's opinion: "Since 1978, the Board has consistently adhered to the *Power Systems*[, 239 N.L.R.B. 445 (1978), *enf. denied*, 601 F.2d 936 (7th Cir. 1979),] rule that an employer or union who sues an *employee* for retaliatory motive is guilty of a violation of the Act," *id* at 739; "by suing an *employee* who files charges with the Board...the employer can place its employees on notice," *id*. at 740, and "[w]here, as here, such a suit is filed against hourly-wage waitresses or other *individuals who lack the backing of a union*, the need to allow the Board to intervene and provide a remedy is at its greatest," *id*. at 741.

defines labor organizations separately from employees. The *amici* are concerned that the Board's and Circuit Court's holding threatens to undermine the long accepted distinction between non-employee unions and their employees. "By its plain terms, . . . the NLRA confers rights only on employees, not on unions or their nonemployee organizers." *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992)."

That the Board's holding constitutes a revolutionary expansion of *Bill Johnson's Restaurants* can be seen in earlier rulings of the Board itself. Thus, in *Montgomery Ward Co.*, 288 N.L.R.B. 126, 195 (1988), the Board upheld an ALJ recommendation not to award attorneys' fees as a remedy to a stranger union that was not the employee bargaining representative, as follows:

> [T]he cases where the Board has awarded litigation expenses for civil or criminal court proceedings resulting from an employer's unlawful conduct, such awards have been uniformly given to employees. None of the cases involve non-employee union representatives. [citations omitted]. In light of the above I find no compelling basis for extending recovery of legal expenses for the criminal action or to direct the Respondent to request expurgation of the court's records on behalf of non-employee Johnson. (Emphasis added).

The Board has not ruled that BE&K's lawsuit was patently frivolous or its defenses not debatable, two requirements this Court adopted when it considered a Board reimbursement remedy case utilizing *Tiidee*

Products. *NLRB v. Food Store Empl., Local 347*, 417 U.S. 1, 9-10 & n.9 (1974). In *Tiidee*, the remedy there would have been considered "extraordinary," while here, it appears to have become simply part of a "conventional make-whole remedy."[9]

On remand from this Court's decision in *Food Store Empl., Local 347*, the Board clarified its policy and made it clear that costs and fees are limited to cases where "patently frivolous defenses" are asserted and are not recoverable where the defenses "are debatable," which includes situations that are "dependent on resolutions of credibility." *Heck's, Inc.*, 215 N.L.R.B. No. 142 (1974). Until the recent series of cases outlined here, this procedure remained the Board's unwavering standard. *Unbelievable, Inc.*, 318 N.L.R.B. 857, 860-61 (1995).

These standards derived from *Tiidee Products* have been uniformly applied in sustaining fee awards "only where the defenses asserted by the employer...are totally without merit or frivolous." *East Bay Chevrolet v. NLRB*, 659 F.2d 1006, 1011 (9th Cir. 1981); *J.P. Stevens & Co. v. NLRB*, 612 F.2d 881, 883 (4th Cir. 1980) ("only for frivolous or dilatory conduct"); *Dist. 65, Distributive Workers v. NLRB*, 683 F.2d 1155, 1167 (D.C. Cir. 1978) (affirming the *Heck's* frivolous standard); *United Steelworkers of Amer. v. NLRB*, 496 F.2d 1342, 1352-53 (5th Cir. 1974) (make whole remedy

---

[9]In *Shepard v. NLRB*, 459 U.S. 344, 350 (1983), a wrongful dues cases, the Court affirmed the Board's order that the reimbursement remedy is to be "reserved for especially egregious cases." The decision below does not explain the reason for the dichotomy of treatment in the Board's decisions.

not available where "factually debatable questions," exist, the conduct was not for delay of collective bargaining, or frivolous); *Federal Prescription Service, Inc. v. NLRB*, 496 F.2d 813, 819 (8th Cir. 1974) (frivolous). The case at bar represents a dramatic departure from this standard without explanation.

The Board's remedial powers should not be applied to award attorneys' fees in cases involving non-employee actions filed with "debatable support." *Id.* *See Unbelievable, Inc.*, 318 N.L.R.B. at 860. For a lawsuit "proven to be without merit, [] does not mean that the suit was ipso facto an unfair labor practice." *IBEW, Local 532 (Brink Constr. Co.)*, 291 N.L.R.B. 437, 438 (1988).

In situations that should have required the Board to use a disciplined approach to determining retaliatory intent, the Board has not been circumspect at all in awarding fees. For example, in *American Pacific Concrete Pipe*, 292 N.L.R.B. 1264 (1989), it awarded fees against an employer's breach of contract and fraud suit where the union breached a private settlement agreement with it and pursued further remedies with the Board.

In *Federal Security, Inc.*, 336 N.L.R.B. No. 52 (2001), the Board issued a *Bill Johnson's Restaurant* remedy against the employer when it sought to recover damages for malicious prosecution and libel stemming from employee activity found *not* to be concerted activity by the Seventh Circuit in *NLRB v. Federal Security, Inc.*, 154 F.3d 751 (7th Cir. 1998). In *Heisler Food Enter., Ltd.*, Case No. 2-CA-30899, 1999 NLRB LEXIS 889

(1999), an ALJ ordered dismissal of the employer's libel and slander lawsuit against the union for publicizing through letters and flyers that its Jewish bakery was violating Kosher rules by contaminating dairy products with meat and other goods. Because the ALJ found the union's conduct protected activity, "it was by definition retaliatory within the meaning of *Bill Johnson*...." 1999 NLRB LEXIS at *82.

In *Johnson & Hardin Co. v. NLRB*, 49 F.3d 237, 244 (6th Cir. 1995), the court plainly refused to enforce an attorney's fee award in favor of non-employee union organizers. Relying upon this Court's decision in *Bill Johnson's Restaurants* and *Tiidee Products* it found the "harsh remedy of a grant of attorneys' fees" should not be awarded to non-employee unions.

In addition, under *Tiidee Products*, BE&K's defense of the single unfair labor practice charge stemming from its filing of a secondary boycott and an antitrust count in federal court cannot be deemed "frivolous," in "clear flagrant violation of the law," *id.*, pre-empted or an illegal act. *Local 32B-32J, Service Employees Int'l Union*, 68 F.3d 490, 496 (D.C. Cir. 1995) (interpreting *Bill Johnson's Restaurants* as allowing the Board to award fees "if the litigation was unlawful").[10]

---

[10]In *Teamsters Local 776 (Rite Aid Corp.)*, 305 N.L.R.B. 832 (1991), the Board explained, that "[t]he 'retaliatory motive' refers to *actual motive* of the respondent-plaintiff in filing the suit." *Id.* at 834. This requires "an improper motivation, a subjective criterion." *Teamsters, Local 776 v. NLRB*, 973 F.2d 230, 236 (3d Cir. 1992). Here, the Board did not explain this criterion in

(continued...)

It has become clear that the Board's cases show it has completely lost the ability to distinguish between cases against labor organizations and employees and in situations where Section 7 activity is and is not involved for purposes of issuing a remedial order. In every case, the Board finds a judicial loss is equivalent to lack of merit and therefore a violation of Section 8(a)(1) of the Act.

In *Bill Johnson's*, this Court was asked to protect relatively defenseless employees from retaliatory, nonmeritorious employer lawsuits. The present decision, however, shifts the entire balance of American labor relations by threatening employers with unfair labor practice findings merely for defending their businesses against well funded "corporate campaign" activities by large labor organizations, much of which is occurring outside the confines of the NLRA. BE&K's petition should be granted so that the Court can resolve the serious and important conflicts created in the law by the holdings of the NLRB and the Court of Appeals.

---

[10](...continued)
BE&K's situation.

CONCLUSION

For these reasons, and for each of the reasons set forth in greater detail in BE&K's Petition, *amici curiae* respectfully request that a writ of *certiorari* issue to review the judgment of the court of appeals.

Respectfully submitted,

Michael E. Avakian*
SMETANA & AVAKIAN
5211 Port Royal Road, Suite 103
Springfield, VA 22151
(703) 321-9181

*Attorney of Record for *Amici Curiae*

Dated: December 5, 2001

Supreme Court, U.S.
FILED
FEB 19 2002
CLERK

(10)

No. 01-518

In The
Supreme Court of the United States

BE&K CONSTRUCTION CO.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, et al.,

Respondents.

On Writ of Certiorari To The United States Court of Appeals
For The Sixth Circuit

JOINT APPENDIX

MAURICE BASKIN
Counsel of Record for Petitioner
Venable, Baetjer, Howard & Civiletti LLP
1201 New York Avenue NW, Suite 1000
Washington, D.C. 20005-3917
(202) 962-4800

THEODORE B. OLSON
Solicitor General of the U.S.
Counsel of Record for Respondent NLRB
Department of Justice, Room 5614
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001
(202) 514-2217

PETER D. NUSSBAUM
*Counsel of Record for Respondent Unions**
Altshuler, Berzon, Nussbaum, Rubin & Demain
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

SANDRA RAE BENSON
*Counsel of Record for Respondent Unions**
Vanbourg, Weinberg, Roger & Rosenfeld
180 Grand Avenue, 14th Floor
Oakland, CA 94512-3741
(510) 839-6600

*(Parties Represented by Above Counsel Listed on Inside Cover)

Petition for Writ of Certiorari Filed: September 25, 2001
Certiorari Granted: January 4, 2002

105 pp

Attorneys for Respondents International Brotherhood of Electrical Workers, Local 302, AFL-CIO; and Local 342, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO

Attorneys for Respondents District Council of Iron Workers of the State of California and Vicinity, International Union of Bridge, Structural and Ornamental Iron Workers, AFL-CIO; Contra Costa County Building and Construction Trades Council, AFL-CIO; Northern California District Council of Laborers, Laborers International Union of North America; Bay Counties District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; Operating Engineers Local Union of Operating Engineers, AFL-CIO; Local Union No. 378, International Union of Bridge, Structural and Ornamental Iron Workers, AFL-CIO; Cement Masons Union Local No. 825, Operative Plasterers and Cement Masons International Association, AFL-CIO; and Local No. 549, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO

TABLE OF CONTENTS

Relevant Docket Entries 1

USS-POSCO Industries et al. v. Contra Costa County Building & Const. Trades Council, et al., 692 F. Supp. 1166 (N.D. Cal. 1988) 13

USS-POSCO Industries et al. v. Contra Costa County Building & Const. Trades Council, et al., 721 F. Supp. 239 (N.D. Cal. 1989) 22

8/21/89 Order Partially Granting Defendants' Motion to Strike and for Sanctions, *USS-POSCO Industries, et al. v. Contra Costa Building & Construction Trades Council, AFL-CIO et al.* (*USS-POSCO*), U.S. District Court for the Northern District Of California 30

10/2/89 Order Awarding Attorney's Fees, *USS-POSCO*, U.S. District Court for the Northern District Of California 38

11/21/89 Order Striking Portions of the Complaint, *USS-POSCO*, U.S. District Court for the Northern District Of California.....40

6/8/90 Order, *USS-POSCO*, 134 LRRM 2590 (N.D. Cal. 1990), *as amended*, 136 LRRM 2647 (N.D. Cal. 7/26/90) 43

9/5/91 Order, *USS-POSCO*, U.S. District Court for the Northern District of California.....56

2/13/92 Order for the Issuance of Final Judgment, *USS-POSCO*, U.S. District Court for the Northern District of California.....58

USS-POSCO, 31 F.3d 800 (9th Cir. 1994).....62

7/29/94 Sandra Rae Benson Declaration.....81

4/18/96 Richard Leasia Affidavit.....85

5/17/96 Declaration of Peter D. Nussbaum, with Exhibits 2 and 3.....90

BE&K Construction Co., 329 N.L.R.B. 717 (1999).....28a-68a*

BE&K Construction Co. v. NLRB, 246 F.3d 619 (6th Cir. 2001).....1a-25a

BE&K Construction Co. v. NLRB, No. 99-6469/00-5012 (6th Cir. 2001) Order denying rehearing en banc.....26a-27a

UNITED STATES CONSTITUTION & STATUTES

United States Constitution, First Amendment.....69a

National Labor Relations Act, 29 U.S.C. § 151 *et seq.*
29 U.S.C. § 157.....69a
29 U.S.C. § 158(a)(1), (b)(4)(ii)(B).....69a
29 U.S.C. § 160(c).....70a

* Page designations followed by an "a" refer to items in the appendix to Petitioner's Petition for Writ of Certiorari.

Labor Management Relations Act, 1947, § 303, 29 U.S.C. § 187.....71a

General Docket
US Court of Appeals for the Sixth Circuit

BE&K CONSTRUCTION COMPANY

Petitioner Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD;

Respondent Cross-Petitioner

STEAMFITTERS LOCAL 342, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO (US LOCAL 342); LOCAL 302 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO (IBEW LOCAL 302); DISTRICT COUNCIL OF IRONWORKERS OF THE STATE OF CALIFORNIA AND VICINITY; INTERNATIONAL UNION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS, AFL-CIO

Intervenors

1/6/00	NLRB Case Docketed. Cross-Application for enforcement of an order of the NLRB filed by Respondent (m-1/6 by case manager) (ac) [00-5012]
1/6/00	CERTIFIED LIST filed. [99-6469, 00-5012] (ac) [00-5012 99-6469]
1/6/00	BRIEFING LETTER SENT setting cross appeal briefing schedule: first brief due

2/15/2000; second brief due 3/16/2000 (NLRB & ITV); fourth brief due 3/30/2000; appendix due 4/6/2000; final briefs due 4/27/2000. [99-6469, 00-5012] (ac) [00-5012 99-6469]

1/6/00 ADMINISTRATIVE RECORD filed. Volumes included: 1 Ex; 1 Pl. [00-5012] (mrs) [00-5012]

1/21/00 AMENDED CERTIFIED LIST filed. [99-6469, 00-5012] (ac) [00-5012 99-6469]

2/16/00 FIRST PROOF BRIEF filed by Maurice Baskin for Petitioner Cross-Respondent BE&K Constr. Certificate of Service date 2/15/2000. Number of Pages: 66. [99-6469, 00-5012] _ (ac) [00-5012 99-6469]

2/16/00 Request to require oral argument filed by Maurice Baskin for Petitioner Cross-Respondent BE&K Constr. [99-6469, 00-5012] (ac) [00-5012 99-6469]

2/24/00 APPEARANCE filed by Attorney Heather L. MacDougall for Assoc Builders, LPA Inc. [99-6469, 00-5012] (ac) [00-5012 99-6469]

2/24/00 MOTION filed to allow LPA Inc & Associated Builders to become an amici curiae. Motion filed by Heather L. MacDougall for Assoc Builders, LPA Inc. Certificate of service date 2/22/2000. [99-6469, 00-5012] (ac) [00-5012 99-6469]

2/24/00 TENDERED : amici curiae brief from Heather L. MacDougall for Assoc Builders, LPA Inc. [99-6469, 00-5012] (ac) [00-5012 99-6469]

3/2/00 Intervenor MOTION filed to extend time to 4/14 to file brief . Motion filed by Sandra R. Benson for Intervenors Intl Union of Bridge, District Council, Peter D. Nussbaum for Intervenors Local 302 Intl, Steamfitters Local. Certificate of service date 2/29/2000. [99-6469, 00-5012] (ac) [00-5012 99-6469]

3/6/00 Respondent MOTION filed to extend time to file brief. Motion filed by Aileen A. Armstrong for Respondent Cross-Petitioner NLRB. Certificate of service date 3/1/2000. [99-6469, 00-5012] (ac) [00-5012 99-6469]

3/6/00 LETTER SENT by ac granting motions in part to extend briefing filed by Aileen A. Armstrong, Sandra R. Benson, Peter D. Nussbaum, resetting cross appeal briefing schedule: second & itv briefs now due 4/6/2000; fourth brief now due 4/20/2000; appendix now due 4/27/2000; final briefs now due 5/18/2000. [99-6469, 00-5012] (ac) [00-5012 99-6469]

3/29/00 Respondent's 2nd MOTION filed to extend time to 4/20 to file brief. Motion filed by Eileen A. Armstrong for Respondent Cross-Petitioner NLRB. Certificate of service date 3/28/00. [99-6469, 00-5012] (ac) [00-5012 99-6469]

3/30/00 LETTER SENT by ac granting motion to extend briefing filed by Aileen A. Armstrong, resetting cross appeal briefing schedule: second brief due 4/20/00; fourth brief due 5/10/00; appendix due 5/17/00; final briefs now due 6/7/00. [99-6469, 00-5012] (ac) [00-5012 99-6469]

4/6/00 Intervenor MOTION filed to take judicial notice . Motion filed by Peter D. Nussbaum for Intervenors Local 302 Intl, Steamfitters Local. Certificate of service date 4/5/00. [99-6469, 00-5012] (ac) [00-5012 99-6469]

4/7/00 PROOF BRIEF filed by Sandra R. Benson for Intervenors Intl Union of Bridge, District Council. Certificate of service date 4/6/00 . Number of Pages: 72. [99-6469, 00-5012] (ac) [00-5012 99-6469]

4/7/00 Request to require oral argument filed by Sandra R. Benson for Intervenors Intl Union of Bridge, District Council. [99-6469, 00-5012] (ac) [00-5012 99-6469]

4/7/00 PROOF BRIEF filed by Peter D. Nussbaum for Intervenors Local 302 Intl, Steamfitters Loca. Certificate of service date 4/5/00 . Number of Pages: 71. [99-6469, 00-5012] (ac) [00-5012 99-6469]

4/7/00 Request to require oral argument filed by Peter D. Nussbaum for Intervenors Local 302 Intl, Steamfitters Local [99-6469, 00-5012] (ac) [00-5012 99-6469]

4/24/00 PROOF BRIEF filed by Anne Marie Lofaso and David Habenstreit for Respondent Cross-Petitioner NLRB. Copies: 1. Certificate of Service date 4/20/00 . Number of Pages: 65. [99-6469, 00-5012] _ (ac) [00-5012 99-6469]

4/24/00 Request to require oral argument filed by Anne Marie Lofaso and David Habenstreit for

Respondent Cross-Petitioner NLRB. [99-6469, 00-5012] (ac) [00-5012 99-6469]

5/11/00 PROOF BRIEF filed by Maurice Baskin for Petitioner Cross-Respondent BE&K Constr. Certificate of service date 5/10/00 . Number of Pages: 30. [99-6469, 00-5012] (ac)

5/18/00 Intervenor MOTION filed requesting leave to appear at oral argument. Motion filed by Peter D. Nussbaum for Intervenors Local 302 Intl, Steamfitters Local. Certificate of service date 5/17/00 . [99-6469, 00-5012] (ac) [00-5012 99-6469]

5/18/00 APPENDIX filed by Maurice Baskin for Petitioner Cross-Respondent BE&K Constr. Copies: 5. Certificate of service date 5/17/00 [99-6469, 00-5012] (ac) [00-5012 99-6469]

6/2/00 Intervenor MOTION filed to take judicial notice. Motion filed by Sandra R. Benson for Intervenors Intl Union of Bridge, District Council. Certificate of service date 5/30/00 . [99-6469, 00-5012] (ac) [00-5012 99-6469]

6/5/00 FINAL BRIEF filed by Peter D. Nussbaum for Intervenors Local 302 Intl, Steamfitters Local. Copies: 7 Certificate of service date 6/1/00 Number of Pages: 73. [99-6469, 00-5012] (ac) [00-5012 99-6469]

6/5/00 Request to require oral argument filed by Peter D. Nussbaum for Intervenors Local 302 Intl, Steamfitters Local. [99-6469, 00-5012] (ac) [00-5012 99-6469]

6/5/00 APPEARANCE filed by Attorney Meera Trehan for Intervenors Local 302 Intl, Steamfitters Local. [99-6469, 00-5012] (ac) [00-5012 99-6469]

6/6/00 FINAL BRIEF filed by Maurice Baskin for Petitioner Cross-Respondent BE&K Constr. 7. Certificate of Service date 6/5/00 . Number of Pages: 67. [99-6469, 00-5012] (ac) [00-5012 99-6469]

6/6/00 Request to require oral argument filed by Maurice Baskin for Petitioner Cross-Respondent BE&K Constr. [99-6469, 00-5012] (ac) [00-5012 99-6469]

6/6/00 FINAL BRIEF filed by Maurice Baskin for Petitioner Cross-Respondent BE&K Constr. Copies: 7. Certificate of service date 6/5/00. Number Pages: 31. [99-6469, 00-5012] (ac) [00-5012 99-6469]

6/8/00 FINAL BRIEF filed by Sandra R. Benson for Intervenors Intl Union of Bridge, District Council. Copies: 7 Certificate of service date 6/7/00 Number of Pages: 70. [99-6469, 00-5012] (ac) [00-5012 99-6469]

6/8/00 Request to require oral argument filed by Sandra R. Benson for Intervenors Intl Union of Bridge, District Council. [99-6469, 00-5012] (ac) [00-5012 99-6469]

6/9/00 FINAL BRIEF filed by Anne Marie Lofaso and David Habenstreit for Respondent Cross-Petitioner NLRB. Copies: 7 Certificate of service date 6/7/00 . Number of Pages: 69. [99-6469, 00-5012] (ac) [00-5012 99-6469]

6/9/00 Request to require oral argument filed by Anne Marie Lofaso and David Habenstreit for Respondent Cross-Petitioner NLRB. [99-6469, 00-5012] (ac) [00-5012 99-6469]

6/14/00 Petitioner RESPONSE in opposition filed regarding motions to take judicial notice. Response from Maurice Baskin for Petitioner Cross-Respondent BE&K Constr Certificate of service date 6/13/00 [99-6469, 00-5012] (ac) [00-5012 99-6469]

9/5/00 Intervenor MOTION filed requesting leave to appear at oral argument and allote them five additional minutes. Motion filed by Sandra R. Benson for Intervenors Intl Union of Bridge, District Council. Certificate of service date 8/31/00 . [99-6469, 00-5012] (ac) [00-5012 99-6469]

11/29/00 Oral argument date set for February 1, 2001 in court room 403. Notice of argument sent to counsel. [99-6469, 00-5012] (rld) [00-5012 99-6469]

12/27/00 Errata to brief of intervenors UA Local 302, et al filed 6/5/00 by Peter D. Nussbaum for Intervenor Local 302 Intl, Steamfitters Local. [99-6469, 00-5012] (ac) [00-5012 99-6469]

12/27/00 ADDITIONAL CITATION filed by Peter D. Nussbaum for Intervenors Local 302 Intl, Steamfitters Local Certificate of service date none but served. [99-6469, 00-5012] (ac) [00-5012 99-6469]

1/9/01 ORDER filed granting motions to appear at oral argument filed by Sandra R. Benson and Peter D. Nussbaum. The court will allow one 5 minute extension for all intervenors to argue orally. BE&K & NLRB will also have an additional 5 minutes for a total of 20 minutes. The intervenors motions to take judicial notice will be taken under advisement pending oral argument and granting motion to file an amicus curiae brief filed by Heather L. MacDougall. [99-6469, 00-5012] (ac) [00-5012 99-6469]

1/9/01 BRIEF filed by Heather L. MacDougall for Amici Curiae Assoc Builders and LPA Inc. Copies 7. Certificate of service date 2/22/00. Number of Pages: 36. [99-6469, 00-5012] (ac) [00-5012 99-6469]

1/17/01 APPEARANCE filed by Attorney Robert J. Englehart for Respondent Cross-Petitioner NLRB. [99-6469, 00-5012] (ac) [00-5012 99-6469]

1/26/01 ADDITIONAL CITATION filed by Meera Trehan for Intervenors Local 302 Intl, Steamfitters Local. Certificate of service date 1/26/01 [99-6469, 00-5012] (ac) [00-5012 99-6469]

1/29/01 ADDITIONAL CITATION filed by Aileen A. Armstrong for Respondent Cross-Petitioner NLRB. Certificate of service date 1/26/01 [99-6469, 00-5012] (yh) [00-5012 99-6469]

1/30/01 ADDITIONAL CITATION filed by Maurice Baskin for Petitioner Cross-Respondent BE&K Constr. Certificate of service date none

but served. [99-6469, 00-5012] (ac) [00-5012 99-6469]

1/30/01 Respondent MOTION filed for reallocation of oral argument time. Motion filed by Robert J. Englehart for Respondent Cross-Petitioner NLRB. Certificate of service date 1/30/01. [99-6469, 00-5012] (ac) [00-5012 99-6469]

2/1/01 CAUSE ARGUED on 2/1/01 by Maurice Baskin for Petitioner Cross-Respondent BE&K Constr in 99-6469/00-5012, Robert J. Englehart for Respondent Cross-Petitioner NLRB in 99-6469/00-5012, Peter D. Nussbaum for Intervenor Local 302 Intl, Intervenor Steamfitters Local in 99-6469/00-5012, Sandra R. Benson for Intervenor Intl Union of Bridge, Intervenor District Council in 99-6469/00-5012, before Judges Daughtrey, Gilman, Collier. [99-6469, 00-5012] (me) [00-5012 99-6469]

2/2/01 LETTER SENT by ac granting motion for reallocation of oral argument filed by Robert J. Englehart. [99-6469, 00-5012] (ac) [00-5012 99-6469]

3/13/01 ADDITIONAL CITATION filed by Maurice Baskin for Petitioner Cross-Respondent BE&K Constr. Certificate of service date none but served. [99-6469, 00-5012] (ac) [00-5012 99-6469]

3/26/01 ADDITIONAL CITATION filed by Peter D. Nussbaum for Intervenors Local 302 Intl, Steamfitters Local Certificate of service date none but served. [99-6469, 00-5012] (ac) [00-5012 99-6469]

4/9/01	OPINION filed : DENY BE&K's petition for review of the Board decision and GRANT the Board's request for enforcement of that ruling, decision for publication pursuant to local rule 206 [99-6469, 00-5012] . Martha C. Daughtrey, Authoring Judge, Ronald L. Gilman, Circuit Judge, Curtis L. Collier, District Judge. (mcp) [00-5012 99-6469]
4/9/01	JUDGMENT : The cross-application for enforcement of the order issued by the National Labor Relations Board in this matter is GRANTED and the petition for review is DENIED. (mcp) [00-5012 99-6469]
4/13/01	BILL OF COST filed by David Habenstreit for Respondent Cross-Petitioner NLRB. Amount: $221.00. Certificate of service date 4/11/01 . [99-6469, 00-5012] (ac) [00-5012 99-6469]
4/27/01	TENDERED : bill of cost from Sandra R. Benson for Intervenors Intl Union of Bridge, District Council. [99-6469, 00-5012] (ac) [00-5012 99-6469]
5/23/01	PETITION for en banc rehearing filed by Maurice Baskin for Petitioner Cross-Respondent BE&K Constr. Certificate of service date 5/22/01. [99-6469, 00-5012] (blh) [00-5012 99-6469]
6/28/01	ORDER filed denying petition for en banc rehearing [2361205-1] filed by Maurice Baskin [99-6469, 00-5012]. Martha C. Daughtrey, Ronald L. Gilman, Circuit Judges;

	Curtis L. Collier, District Judge. (blh) [00-5012 99-6469]
7/23/01	ADMINISTRATIVE RECORD RETURNED to lower court at the end of appellate proceedings. [99-6469, 00-5012] Volumes included: 1 PL; 1 Ex. (mrs) [00-5012 99-6469]
7/27/01	MANDATE ISSUED with costs to be recovered by Respondent Cross-Petitioner NLRB. Amount: $221.00. [99-6469, 00-5012] (ac) [00-5012 99-6469]
8/6/01	Record acknowledgment received from the district court. Acknowledged by: aa. Acknowledgment date: 08/01/01. [99-6469, 00-5012] (mrs) [00-5012 99-6469]
8/23/01	BILL OF COST filed by Sandra R. Benson for Intervenors Intl Union of Bridge, District Council. Amount: $224.25. Certificate of service date 4/24/01. [99-6469, 00-5012] (ac) [00-5012 99-6469]
8/23/01	LETTER SENT by ac: allowing Intervenors, District Council of Ironworkers, International Union of Bridge, AFL-CIO, et al to recover costs in the amount of $224.25. [2412610-1] [99-6469, 00-5012] (ac) [00-5012 99-6469]
10/1/01	U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Petitioner Cross-Respondent BE&K Constr in 99-6469, Petitioner Cross-Respondent BE&K Constr in 00-5012 . Filed in the Supreme Court on 09-25-01, Supreme Ct. case number:

01-518 . [99-6469, 00-5012] (swh) [00-5012 99-6469]

2/4/02 U.S. Supreme Court letter filed granting petition for writ of certiorari limited to a single question [2432176-1] filed by BE&K Constr, BE&K Constr filed in Supreme Court January 4, 2002 [99-6469, 00-5012] in 99-6469, 00-5012. Filed in the Supreme Court on 01-04-02. (swh) [00-5012 99-6469]

USS-POSCO INDUSTRIES and BE & K CONSTRUCTION COMPANY, Plaintiffs, v. CONTRA COSTA COUNTY BUILDING & CONSTRUCTION TRADES COUNCIL, AFL-CIO; PILE DRIVERS, DIVERS, CARPENTERS, BRIDGE, WHARF & DOCK BUILDERS, LOCAL 34, of the UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO; BAY COUNTIES DISTRICT COUNCIL OF CARPENTERS, AFL-CIO; OPERATING ENGINEERS LOCAL UNION NO. 3 of the INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO; IRON WORKERS LOCAL 378 of the INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS, AFL-CIO; DISTRICT COUNCIL OF IRON WORKERS OF THE STATE OF CALIFORNIA & VICINITY, AFL-CIO; PLASTERERS & CEMENT MASONS LOCAL 825 of the OPERATIVE PLASTERERS & CEMENT MASONS INTERNATIONAL ASSOCIATION, AFL-CIO; DISTRICT COUNCIL OF PLASTERERS & CEMENT MASONS OF NORTHERN CALIFORNIA, AFL-CIO; NORTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS, AFL-CIO; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS, LOCAL NO. 549, AFL-CIO; STEAMFITTERS LOCAL UNION NO. 342 of the UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES & CANADA, AFL-CIO; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 302, AFL-CIO, Defendants

No. C-87-4829 DLJ
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

July 29, 1988, Decided
July 29, 1988, Filed

***

JUDGES: D. Lowell Jensen, United States District Judge.

OPINIONBY: JENSEN

OPINION: MEMORANDUM AND ORDER

D. LOWELL JENSEN, UNITED STATES DISTRICT JUDGE.

Defendants' motions to dismiss or for partial summary judgment came on for hearing on June 1, 1988. Defendants International Brotherhood of Electrical Workers (IBEW) Local 302 and Steamfitters Local 342 appeared through counsel Peter P. Nussbaum. Remaining defendants appeared through counsel Victor J. Van Bourg. Plaintiffs appeared though counsel Richard A. Leasia. The Court has considered the memoranda and documents submitted, as well as the oral arguments of counsel and now ORDERS as follows:

1. The defendants' motions for partial summary judgment as to the plaintiffs' first and fourth claims for relief are GRANTED;

2. The defendants' motion for summary judgment as to the plaintiffs' third claim for relief is DENIED without prejudice and may be refiled on November 9, 1988;

3. Defendants IBEW Local 302 and Steamfitters Local 342's motion for a protective order prohibiting discovery in this matter is DENIED without prejudice; and

4. Defendants' motion for sanctions is DENIED without prejudice.

I.

This lawsuit raises the issue of the scope of permissible activities through which labor unions may attempt to influence hiring and contracting decisions by employers.

Plaintiff USS-POSCO Industries (UPI) is a California general partnership formed by USX Corporation (formerly US Steel) and Pohang Iron and Steel Company, a South Korean concern. The purpose of the partnership is to modernize and operate an outdated steel facility in Pittsburg, California. Plaintiff BE&K Construction Company (BE&K) is a non-union contractor to which UPI awarded a construction contract to modernize the facility. There are 12 defendants. Seven are locals of various unions associated with the AFL-CIO, and five are associations of labor unions.

Plaintiff UPI plans a multimillion dollar modernization project for the Pittsburg facility (the Project). After plaintiff BE&K was awarded the primary contract, defendants allegedly attempted to coerce plaintiff UPI to enter into illegal "hot cargo" agreements prohibited by Section 8(e) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(e), and to force plaintiffs UPI and BE&K and other entities, by secondary boycott, to cease doing business with each other, and/or recognize the defendant labor organizations as the representatives of plaintiffs' employees, even though defendants had not been certified as representatives under 29 U.S.C.
§ 159. Plaintiffs allege that such acts constitute unfair labor practices under Sections 8(b)(4)(ii) (A) and (B) of the NLRA, 29 U.S.C. §§ 158(b)(4)(ii)(A) and (B).

Defendants allegedly effected this illegal coercion by four methods: (1) advocating the adoption and enforcement of a toxic waste ordinance in Contra Costa County which could impede the Project's progress; (2) picketing and

handbilling at plaintiffs' premises; (3) filing a lawsuit in state court alleging, among other things, violations of California's Health and Safety Code; and (4) initiating collective bargaining grievance proceedings against Eichleay Constructors, Inc. (ECI), a partner in a joint venture with plaintiff BE&K to perform the Project contract.

Defendants' motions challenge the first, third, and fourth claims. Defendants argue that the activities challenged in the first and third claims (legislative lobbying and filing lawsuits, respectively) are protected by the First Amendment. Regarding the fourth claim, initiation of grievance proceedings, defendants argue that because contractual grievance and arbitration proceedings are the preferred method of resolving labor disputes under federal labor policy, resort to those processes cannot create liability for unfair labor practices.

II.

As to legislative lobbying and the filing of lawsuits, defendants assert that these activities fall under the First Amendment right to petition, and that the *Noerr-Pennington* doctrine provides immunity for such activities. The *Noerr-Pennington* doctrine arose in the antitrust context. The doctrine basically provides antitrust immunity for certain petitioning activities, even if done for the purpose of restraining trade. Defendants argue that the rationale behind *Noerr-Pennington* should apply to the instant case, and that defendants' petitioning activities, protected under the First Amendment, are immune from liability under federal labor laws.

A. The *Noerr-Pennington* Doctrine

In Eastern Railroad Presidents Conference, et al. v. Noerr Motor Freight, Inc., et al., 365 U.S. 127, 5 L. Ed. 2d 464, 82 S. Ct. 523 (1961), the Supreme Court held that the

Sherman Act did not bar an association of railroad companies from banding together to influence legislation destructive of the trucking industry. The unanimous opinion of the Court purported only to interpret the antitrust laws. In doing so, the Court considered several factors. First, the Court reasoned that representative democracy depends on "the ability of the people to make their wishes known to their representatives." *Id.* at 137. The Sherman Act was not intended to regulate this type of political activity, but only business activity. Second, interpreting the Sherman Act to bar the railroads' lobbying activities would "raise important constitutional questions." *Id.* at 138. The Court concluded that the railroads' activities were not prohibited under the Sherman Act.

In *United Mine Workers v. Pennington*, 381 US. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965), the Court broadened the *Noerr* holding to encompass the petitioning of other public officials besides legislators. *Pennington* also emphasized the irrelevance of the petitioner's underlying purpose. "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." *Id.* at 670.

Despite this language, *Noerr-Pennington* does not shield all petitioning activity from antitrust liability. The *Noerr* Court recognized a "sham" exception: if petitioning activity, "ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor," Sherman Act liability is justified. *Noerr* at 144. However, it is not a sham if the activity is "a genuine effort to influence legislation and law enforcement practices." *Id.*

The concept of the sham exception was further refined in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972). In that case, defendants allegedly conspired to monopolize trade and

commerce in the transportation of goods by instituting administrative and judicial proceedings "to resist and defeat [plaintiffs'] applications . . . to acquire operating rights or to transfer or register those rights." The Court, recognizing the applicability of *Noerr* to petitioning in the courts, distinguished administrative and adjudicatory fora from the legislative lobbying at issue in *Noerr*. Noting that certain types of unethical conduct, "condoned in the political arena," were sanctionable in the adjudicatory context, the Court implied that the scope of protected petitioning activity was narrower in adjudicatory fora than for legislative lobbying. *Trucking Unlimited* at 513. The Court held that institution of baseless, repetitive claims, in order to effectively bar competitors from meaningful access to administrative agencies and the courts, was not "political expression" entitled to First Amendment protection. Such activity fell within *Noerr's* sham exception, "as adapted to the adjudicatory process." *Trucking Unlimited* at 516.

The *Noerr-Pennington* rationale was adapted to the labor context in *Bill Johnson's Restaurants Inc. v. NLRB*, 461 U.S. 731, 76 L. Ed. 2d 277, 103 S. Ct. 2161 (1983), where the Court was presented with an alleged unfair labor practice in the form of a state lawsuit. An employer allegedly filed the state suit solely for the purpose of retaliating against an employee for exercising federally protected labor rights. The Court recognized that under a literal reading of the statutory language, the lawsuit would probably constitute an unfair labor practice. However, the Court acknowledged the First Amendment values underlying the *Noerr-Pennington* doctrine and their applicability in interpreting the unfair labor practice provisions in the NLRA. The Court also noted "the States' compelling interest in the maintenance of domestic peace." Barring a well-founded state lawsuit as an unfair labor practice would infringe on a state's interest in providing judicial remedies for its citizens. Based upon these First Amendment and federalism concerns, the Court held that a well-founded lawsuit, even if brought for an improper

purpose under the NLRA, was not an unfair labor practice under that statute.

B. *Defendants' Petitioning Activities*

1. *Legislative Lobbying*

The complaint alleges that defendants, in order to coerce plaintiffs unfairly, advocated passage of a local toxic waste ordinance which would prevent or impede plaintiffs' modernization project. After passage of the ordinance, defendants allegedly lobbied for its enforcement against plaintiffs.

The lobbying of state and local legislative bodies implicates the same First Amendment and federalism concerns at issue in *Bill Johnson's Restaurants*. The right to petition a legislative body falls squarely under the "umbrella of 'political expression'." *See Trucking Unlimited* at 512-513. As for federalism concerns, this Court will not lightly infer a Congressional intent to "ignore the substantial state interest in protecting the health and well-being of its citizens," *Bill Johnson's Restaurants* at 742 (citations omitted). Such an interest is clearly at stake when a toxic waste law is under consideration by a local legislative body. That an improper motive may have spurred defendants' lobbying efforts does not bring that petitioning activity within the ambit of federal proscriptions against unfair labor practices.

The complaint alleges nothing unlawful or improper about defendants' lobbying activities, except that such activity was coercive under the NLRA. There is no allegation that defendants' activities were other than "a genuine effort to influence legislation and law enforcement practices." *Cf. Noerr* at 144. There is no allegation that plaintiffs were denied "meaningful access" to present their own views before the Contra Costa County Board. *Cf. Trucking Unlimited* at

512. For the same reasons that a well-founded state lawsuit cannot be deemed an unfair labor practice, even if prosecuted with retaliatory intent, defendants' lobbying activities in the instant case do not constitute unfair labor practices.

Plaintiffs' first claim is therefore DISMISSED. Fed.R.Civ.P. 12(b)(6).

2. *State Court Action*

Defendants correctly identify the right of access to the courts as a protected First Amendment right. However, "just as false statements are not immunized by the First Amendment right to freedom of speech, . . . baseless litigation is not immunized by the First Amendment right to petition." *Bill Johnson's Restaurants* at 743. There is also no state interest at stake when the state suit is baseless. *Id.* In that situation, the only interest at stake is the strong federal interest in vindicating federal labor rights. Analogizing to the sham exception of *Trucking Unlimited, the Bill Johnson's Restaurants* Court held that a baseless state suit brought with retaliatory intent was an unfair labor practice.

Relying on *Bill Johnson's Restaurant* the Ninth Circuit has held explicitly that a union's prosecution of a suit which lacks a reasonable basis in law and which was filed with an improper motive constitutes an unfair labor practice. *International Longshoremen's and Warehousemen's Union v. Pacific Maritime Association, et al.*, 773 F. 2d 1012 (9th Cir. 1985). In the Court's view, it is appropriate to allow further time for discovery before ruling on this claim. Therefore, the motion is DENIED without prejudice. A renewed hearing is set for December 7, 1988. Defendant's motion papers should be filed by November 9, 1988.

III.

The final claim challenged in defendants' motions relates to defendants' alleged filing of collective bargaining grievances against a secondary employer, ECI. The complaint alleges improper motives.

Plaintiffs' own exhibits indicate that defendants' grievances against ECI were successful. As with well-founded state lawsuits, successful grievances to enforce lawful provisions of a collective bargaining agreement cannot constitute unfair labor practices, regardless of any motive to apply secondary pressure. *Truck Drivers, Union Local 705 v. N.L.R.B.*, 261 U.S. App. D.C. 40, 820 F.2d 448 (D.C. Cir. 1987). Plaintiffs do not claim that what was sought to be enforced was illegal. Nor do they deny that defendants' grievances were successful. Summary judgment as to plaintiff's fourth claim is therefore appropriate.

Accordingly, the motion is GRANTED.

IV.

Various defendants also seek sanctions. The Court DENIES these motions without prejudice. They may be raised again following the Court's ruling after the December 7, 1988 hearing.

IT IS SO ORDERED.

DATED: July 29, 1988

USS-POSCO INDUSTRIES and BE & K CONSTRUCTION COMPANY, Plaintiffs, v. CONTRA COSTA COUNTY BUILDING & CONSTRUCTION TRADES COUNCIL, AFL-CIO, et al., Defendants

No. C87-4829-DLJ
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

May 1, 1989, Decided
May 1, 1989, Filed

Defendants' motions for partial summary judgment, plaintiffs' motion to file an amended complaint, and defendants' motions to dismiss amended complaint and for sanctions were heard by the Court on April 12, 1989. ***

After considering the briefs submitted by the parties, the oral argument of counsel and the applicable legal standards, the Court hereby: (1) GRANTS defendants' motions for partial summary judgment; (2) partially GRANTS plaintiffs' motion to file an amended complaint; (3) partially GRANTS defendants' motions to strike or dismiss the amended complaint; and (4) DENIES defendants' motion for sanctions.

I.

Plaintiffs' action raises the issue of the scope of permissible activities through which labor unions may attempt to influence hiring and contracting decisions by employers.

Plaintiff USS-POSCO Industries ("UPI") is a general partnership formed between USX Corporation and Pohang Iron and Steel for the purpose of modernizing an outdated steel facility in Pittsburg, California. Plaintiff BE & K

Industries ("BE & K") is a non-union contractor to which UPI awarded the contract to modernize the facility. There are 12 defendants. Seven are locals of various unions associated with the AFL-CIO, and five are associations of labor unions.

In their original complaint, plaintiffs allege that defendants engaged in unfair labor practices under sections 8(b)(4)(ii) (A) and (B) of the NLRA, 29 U.S.C. §§ 158(b)(4)(ii) (A) and (B), by: (1) advocating for the adoption and enforcement of a toxic waste ordinance in Contra Costa County which would impede the modernization of the Pittsburg facility; (2) picketing and handbilling at plaintiffs' premises; (3) filling a lawsuit in state court, the "*Pile Drivers*" suit, alleging violations of the California Health and Safety Code; and (4) initiating collective bargaining grievance proceedings against Eichleay Constructors, Inc., a partner in a joint venture with plaintiff BE & K to perform the project contract.

The Court heard defendants' previous motion for partial summary judgment on June 1, 1988. In an Order dated July 29, 1988, the Court:

(1) granted the motion as to plaintiffs' first cause of action alleging improper lobbying of state and local legislative bodies;

(2) granted the motion as to plaintiffs' fourth cause of action for bad faith filing of collective bargaining grievances; and

(3) denied the motion, without prejudice, as to plaintiffs' third cause of action alleging bad faith filing of the *Pile Drivers* litigation in state court. *USS-POSCO v. Contra Costa County Bldg & Const. Trades Council, AFL-CIO*, 692 F. Supp. 1166 (N.D. Cal. 1988).

At the hearing on defendants' previous motion, the Court set a date in early December, 1988 to hear defendants' renewed motion for summary judgment of the third cause of action. The Court requested this second hearing to provide plaintiffs with more time for discovery pursuant to Federal Rule of Civil Procedure 56(f). As the December hearing date approached, a dispute arose between the parties regarding several depositions. The Court issued an Order on November 14, 1988, assigning the discovery dispute to the United States Magistrate and postponing the hearing date for the summary judgment motion until the depositions at issue were completed. Based on the representations made by both parties during oral argument, the Court is satisfied that the depositions underlying the continuance of these motions have been completed. Accordingly, defendants' motions for partial summary judgment are properly before the Court.

II.

Plaintiffs' third claim in the original complaint alleges that defendants committed an unfair labor practice by filing the *Pile Drivers* action in state court. Several of the defendants contend that they are not liable under this claim because they were not parties in the state court litigation. The remaining defendants assert that this claim is barred by the *Noerr-Pennington* doctrine. The Court finds both positions asserted by defendants persuasive.

Defendants IBEW Local 302, Steamfitters Local 342, Contra Costa Building and Construction Trades Council, Plasterers and Cement Masons Local 825 and IBOB Local 549 all contend that they should be dismissed from plaintiffs' third cause of action since they were not parties in the *Pile Drivers* suit. Plaintiffs concede that these defendants were not parties in the state action, but argue that these non-party defendants are still liable under the third cause of action because they are the agents of the defendants who were named in the state lawsuit. UPI's position is based on the

contention that these non-party defendants "played a central, integral role in the highly coordinated campaign against the UPI project, of which the *Pile Drivers* litigation is only a part."

Plaintiffs' position is incorrect. Even assuming that the *Pile Driver* litigation was part of a campaign to halt the UPI project, and that these non-party defendants were highly involved in that campaign, this factual background is not sufficient to hold these defendants liable under this claim. The non-party defendants cannot be held liable for a action based on the filing of lawsuit to which they were not parties. Because plaintiffs have failed to establish that these defendants were named parties in the *Pile Drivers* litigation, the non-party defendants' motions for partial summary judgment are hereby GRANTED.

Regarding the remaining defendants, as the Court's July 29, 1988 Order sets forth, in order to meet their burden of proof, plaintiffs must make an evidentiary showing which establishes both that the *Pile Drivers* suit "lacks a reasonable basis in law and . . . was filed with an improper motive" to state an actionable claim under the *Noerr-Pennington* doctrine. *USS-POSCO*, 692 F. Supp. At 1170 (citing *Int'l Lonshoremen's and Warehousemen's Union v. pacific Maritime Ass'n et al.*, 773 F.2d 1012, 1015 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158, 90 L. Ed. 2d 720, 106 S. Ct. 2277 (1986)); *see also Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 76 L. Ed. 2d 277, 103 S. Ct. 2161 (1983).

Therefore, to defeat defendants' motion for summary judgment, plaintiffs must make a showing sufficient to establish that a genuine issue of material fact exists as to whether (1) the *Pile Drivers* action had no reasonable basis in law, and (2) was motivated by an improper motive. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). Plaintiffs have failed to

satisfy this burden. There is no genuine issue of material fact regarding whether the state court action had a reasonable basis in law.

The *Pile Drivers* litigation sought to enjoin alleged violations of the California Health and Safety Code caused by the removal of hazardous waste materials from the UPI project site. Although the state court action was not successful on its merits,[1] that circumstance is not of itself evidence that the suit was filed without a reasonable foundation and plaintiffs have not provided evidence to support a conclusion that the action was filed without a legal basis. Following the instigation of the *Pile Drivers* litigation, Federal OSHA investigated the jobsite and found numerous health and safety violations. Plaintiffs have submitted no evidence to counter or explain away defendants' showing that the jobsite was cited for violations of health and safety regulations following the instigation of the *Pile Drivers* action. It is therefore clear that there is no genuine issue of material fact on the issue of whether or not health and safety problems existed on the UPI project when the *Pile Drivers* action was filed. Accordingly, the Court finds that the plaintiffs have cited no evidence which could support a finding that no reasonable legal and factual basis existed for the filing of the state court action.

Therefore, the Court hereby GRANTS defendants' motions for partial summary judgment and dismisses plaintiffs' third cause of action.

III.

Plaintiffs filed an amended complaint on October 3, 1988. Defendants contend that plaintiffs improperly amended

1 Defendants' motion for a temporary restraining order and for a preliminary injunction were both denied by the presiding state court.

their complaint by alleging causes of action that were contained in the original complaint and that had previously been dismissed by the Court.

Before addressing the substance of the amended complaint, it must be determined whether plaintiffs are entitled to amend their complaint under the Federal Rules of Civil Procedure. Under Rule 15 of the Federal Rules, "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served, otherwise a party may amend the party's pleading only be leave of the court or by written consent of the adverse party." Fed.R.Civ.P. 15(a).

In the present case, defendants IBEW Local 302 and Steamfitters Local 342 filed a "motion to dismiss and/or for summary judgment," but not an answer to plaintiffs' original complaint, before plaintiffs filed their first amended complaint. Because neither motions to dismiss or motions for summary judgment are responsive pleadings for purposes of Rule 15, *Allen v. Veterans Administration*, 749 F.2d 1386, 1388 (9th Cir. 1984); *Kirk v. United States*, 232 F.2d 763, 770 (9th Cir. 1956), plaintiffs are permitted to file an amended complaint against these two defendants as a matter of course.

The remaining defendants filed an answer to the original complaint prior to the filing of defendants' amended complaint. Thus, under Rule 15(a) plaintiffs may not amend as a matter of course against these defendants. However, after considering the record in this action and the oral argument of counsel, the Court GRANTS plaintiffs' motion under Rule 15(a) for leave to file an amended complaint. Plaintiffs may therefore file an amended complaint against all defendants.

Turning to the substance of plaintiffs' current amended complaint, the Court will not grant leave to file the amended complaint that is currently on file in this action. The current amended complaint is unacceptable because the first

cause of action includes a restatement of several of the claims upon which summary judgment for defendants has already been granted by the Court. Plaintiffs may not allege in their amended complaint causes of action which have already been removed from this action by summary judgment, whether or not they are asserted in combination with other valid or invalid claims. [2] The court therefore partially GRANTS defendants' motions to dismiss or strike plaintiffs' current amended complaint. Plaintiffs must file their revised amended complaint within twenty days from the date of this Order.

IV.

Finally, defendants have also filed a motion for sanctions against plaintiffs for filing their amended complaint. After considering the briefs submitted by the parties and the record in this case, the Court hereby DENIES defendants' motion for sanctions.

V.

Therefore, the Court hereby GRANTS defendants' motions for partial summary judgment, partially GRANTS plaintiffs' motion to file an amended complaint, partially

[2] There has not yet been a sufficient showing made to the Court that it would be futile to allow the second cause of action in the current amended complaint to be included in a subsequent amended complaint. However, this fact does not preclude defendants from bringing appropriate motions to challenge the validity of the antitrust claim when, and if, it is filed.

GRANTS defendants' motions to dismiss or strike the amended complaint, and DENIES defendants' motion for sanctions. A status conference will be held in this action on June 21, 1989 at 9:00 A.M. in the chambers of this Court.

IT IS SO ORDERED.

DATED: May 1, 1989.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

USS-POSCO INDUSTRIES, et al.,	)
	) C87-4829-DLJ
Plaintiffs,	) ORDER
	) PARTIALLY
CONTRA COSTA BUILDING &	) GRANTING
CONSTRUCTION TRADES	) DEFENDANTS'
COUNCIL, AFL-CIO, et al.,	) MOTION
	) TO STRIKE AND
Defendants.	) FOR SANCTIONS

The Court heard defendants' motion to strike or dismiss plaintiffs' second amended complaint and for sanctions on August 16, 1989. James G. Gilliland of Khourie, Crew and Jaefer appeared for plaintiffs. Victoria Chin of Neyhart, Anderson, Nussbaum, Reilly and Freitas appeared for defendants IBEW Local 302 and UA Local 342. Sandra Rae Benson of Van Bourg, Weinbe.g, Roger and Rosenfeld appeared for all other defendants.

In their original complaint, plaintiffs alleged that defendants engaged in unfair labor practices under sections 8(b) (4) (ii) (A) and (B) of the NLRA, U.S.C. §§ 158(b) (4) and (ii) (A) and (B), by: (1) advocating for the adoption and enforcement of a toxic waste ordinance in Contra Costa County which would impede the modernization of plaintiffs' steel facility: (2) picketing and handbilling at plaintiffs' facility: (3) filing a lawsuit in state court alleging violations of the California Health and Safety Code: and (4) initiating collective bargaining grievance proceedings against Eichleay Constructors, Inc., partner in a joint venture with plaintiff BE&K.

The Court heard defendants' first motion for partial summary judgment on June 1, 1988. In an Order dated July 29, 1988, the Court: (1) granted the motion as

to plaintiffs' first cause of action alleging improper lobbying activities; (2) granted the motion as to plaintiffs' fourth cause of action for bad faith filing of collective bargaining grievances;[1] and (3) continued hearing on the motion pursuant to Federal Rule of Civil Procedure 56(f) as to plaintiffs' third cause of action alleging bad faith filing of litigation in state court, *USS-POSCO v. Contra Costa County Bldg & Const. Trades Council AFL-CIO*, 692 F.Supp. 1166 (N.D.Cal. 1988). The Court granted the Rule 56(f) continuance as to plaintiffs' third cause of action to allow the parties more time to conduct discovery regarding the Pile Drivers litigation.

Prior to the hearing date set for the continued motion for summary judgment of plaintiff's original third cause of action, plaintiffs improperly filed a first amended complaint on October 3, 1988. This amended complaint contained causes of action for: (1) violation of section 303 of the Labor Management Relations Act, 29 U.S.C. § 187, based on various acts by defendants, including acts that formed the basis for several of the claims previously removed from this action by the Court pursuant to defendants' June 1 summary judgment motion; and (2) violations of the Sherman Act, 15 U.S.C. §§ 1 and 2.

Defendants' motion for summary judgment of plaintiffs' original third cause of action, the Pile Drivers claim, and a motion to dismiss or strike plaintiffs' improperly filed amended complaint that were heard by the Court on April 12, 1989. On the same date, the Court heard plaintiffs' motion to file an amended complaint. Following the hearing, the Court: (1) granted defendants' motion for summary judgment of plaintiffs' third cause of action, finding that the state court Pile Drivers litigation

[1] The decision of the court to grant summary judgment was based on a finding by the Court that the conduct at issue was constitutionally protected.

was filed in good faith;[2] (2) partially granted defendants' motion to dismiss or strike plaintiffs' amended complaint; and (3) partially granted plaintiffs' motion to file an amended complaint by Order dated May 1, 1989. Specifically, the Court refused to accept plaintiffs' October 3 amended complaint as filed, but granted plaintiffs leave to file another amended complaint. In this regard, the Court stated that:

> [t]he current amended complaint is unacceptable because the first cause of action includes a restatement of several of the claims upon which summary judgment for defendants has already been granted by the Court. Plaintiffs may not allege in their amended complaint causes of action which have already been removed from this action by summary judgment, whether or not they are asserted in combination with other valid or invalid claims.

May 1 Order at 8-9.[3]

> Plaintiffs filed a 46 page second amended complaint on May 22, 1989, alleging causes of action for: (1) antitrust violations under the Clayton Act and Sherman Act: (2) violation of section 303 of the LMRA, 29 U.S.C. 1 187, based on defendants' attempt to coerce plaintiffs into entering a "hot cargo" agreement through the filing of state and federal actions, picketing activities, lobbying activities, and filing of labor grievances; (3) violation of section 303 based on defendants' "picketing handbilling and work stoppages;" (4) violation of section

[2] This decision was also based on a finding that defendants' actions are constitutionally protected.

[3] In footnote 2 of the May 1 Order, the Court stated that it would allow plaintiffs to allege an antitrust claim in their amended complaint. This ruling was made without prejudice to any motions by defendant challenging the substance of such claims.

> 303 based on defendants' lobbying activities directed towards the enactment of a toxic waste ordinance in Contra Costa County; (5) violation of section 303 based on defendants' filing of the Pile Driver's lawsuit; and (6) violation of section 303 based on defendants' filing of grievance proceedings.

Plaintiffs acknowledge that the Court granted summary judgment in favor of defendants as to their fourth fifth and sixth causes of action. However, plaintiffs contend that they have replead this causes of action to preserve their on rights on appeal.

Defendants seek to strike or dismiss all of plaintiffs' causes of action and for sanctions against plaintiff for disobeying the Court's May 1 Order.

After review of the briefs, the record in this action and the applicable legal standards, the Court hereby partially GRANTS defendants' motion to strike, and GRANTS defendants' motion for sanctions.

I.

As previously described, the Court's May 1 Order explicitly states that "plaintiffs may not allege in their amended complaint causes of action which have already been removed from this action by summary judgment, whether or not they are asserted in combination with other valid or invalid claims." In their fourth, fifth and sixth causes of action, plaintiffs have alleged causes of action for which this Court has previously granted summary judgment for defendants. Plaintiffs acknowledge that they have done this, but claim that they were required to replead these claims to preserve their right on appeal. Plaintiffs' position is completely without merit.

Plaintiffs contend that the "repleading" rule that they rely upon pertains to both motions to dismiss when

leave to amend is granted and Rule 56 motions for summary judgment. In support of their position, plaintiffs cite language from the Ninth Circuit's decision in *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981), stating that "[I]t has long been the rule in this circuit that a plaintiff waives all causes of action alleged in the original complaint which are not alleged in the amended complaint." Plaintiffs contend that this language is so "broad" that they were required to replead the removed causes of action to avoid any risk of losing their right of appeal. However, plaintiffs made no reasoned argument addressing the obvious factual distinction that in London, the Ninth Circuit was referring to an amended complaint filed after a motion to dismiss had been granted with leave to amend. London, 644- F.2d at 813. Plaintiffs concede that they cannot produce any legal authority supporting their position that the same "repleading" rules applies to causes of action upon which summary judgment has been granted for defendants.[4]

The "repleading" rule that plaintiffs rely upon only applies to the granting of motions to dismiss with leave to amend under Federal Rule of Procedure 12(b)(6) or the filing of an amended complaint upon the plaintiff's own initiative. King v. Atiyeh, 814 F.2d 565 (9th Cir. 1987); London v. Coopers & Lybrand, 644 F.2d at 814. This is not the situation in the present cast as the Court granted defendants' motion for summary judgment of these claims and only granted leave to file an amended complaint that

[4] Also undermining plaintiffs' argument based on the Ninth Circuit's "repleading" rule is plaintiffs' failure to replead the fourth cause of action in the original complaint in their first amended complaint. Had the Court allowed plaintiffs to file their first amended complaint, plaintiffs, under their interpretation of the Ninth Circuit's pleading requirements, would have waived any appeal regarding the Court's granting of summary judgment for defendants as to plaintiff's original fourth cause of action. Plaintiffs' inconsistent application of their interpretation of the "repleading" rule creates serious doubts about the credibility of their position.

did not include either the claims for which summary judgment had already been granted, or mixed claims containing valid claims and repleaded claims that the Court had already adjudicated on the merits. Thus, plaintiffs did not have leave to file their present fourth, fifth or sixth causes of action. Accordingly, based on the Court's May 1 Order, defendants' motion to strike is hereby GRANTED as to plaintiffs' fourth, fifth and sixth causes of action.

II.

The Court has not yet ruled on the merits of plaintiffs' first, second and third causes of action. However, each of these claims contains, inter alia, repleading of the claims that were removed from this action under Federal Rule of Civil Procedure 56. Moreover, the Court's May 1 Order explicitly prohibits plaintiffs from alleging mixed claims which replead causes of action that the Court has already removed from the lawsuit. Therefore, defendants motion to strike is GRANTED as to those portions of plaintiffs' first, second and third causes of action which have previously been ruled on by the Court.

Defendants have submitted a supplemental briefing indicating those portions of the first, second and third causes that should be removed from the complaint consistent with this Order. Plaintiffs may file a response to this briefing within 20 days from receipt thereof.

III.

Defendants contend that sanctions should be awarded against plaintiffs pursuant to Federal Rule of Civil Procedure based on the filing of plaintiffs' second amended complaint.

Rule 11 of the Federal Rules of Civil Procedure states that:

> [t]he signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose.

Fed. R. Civ. P. 11 (emphasis added).

The Court finds that Rule 11 sanctions are warranted against plaintiffs for the filing of their amended complaint. This finding is predicated on (1) plaintiffs' failure to comply with the Court's May 1 Order, and (2) their misrepresentation to the Court of the Ninth Circuit's "repleading" rule.

Plaintiffs have clearly violated the court's May 1 Order by repleading causes of action for which summary judgment was granted for defendants. The Court's Order explicitly states that such causes of action were not to be included in plaintiffs' amended complaint, whether or not they were combined with otherwise valid causes of action. In fact, plaintiffs concede that they have directly violated the Court's ruling in footnotes to their fourth, fifth and sixth causes of action. Plaintiffs contend that the repleading of these claims was necessary under the "repleading" doctrine within the Ninth Circuit. This argument, as previously discussed, is without merit and provides more justification for the Court to impose sanctions.

Under Rule 11, an attorney's signature constitutes a certificate that a pleading is "warranted by existing law or a good faith argument for the extension . . . of existing law." The Court finds that plaintiffs' interpretation of the Ninth Circuit's "repleading" rule is neither. It is clear,

based upon the cases cited by plaintiffs in support of their position, that the rule does not apply to Rule 56 motions. If the Court adopted plaintiffs' position, it would be required to allow all parties who had a claim removed from a lawsuit by a motion or summary judgment to replead that cause of action to preserve their appeal. If this were the law in the Ninth Circuit, district courts would effectively be unable to remove claims from lawsuits under Rule 56 as plaintiffs would be allowed to replead claims following the granting of a defendant's motion for summary judgment. The Court finds that plaintiffs' interpretation of the "repleading" doctrine is not warranted by existing law or a good faith argument for its extension.

Therefore, defendants will sub mit to the Court an accounting of the expenses incurred in filing the present motion to strike as to plaintiffs' second amended complaint by August 23, 1989. The Court will then issue an Order indicating the amount of sanctions to be awarded against defendants.

IV.

Therefore, defendants' motion to strike is hereby partially GRANTED, and defendants' motion for sanctions is hereby GRANTED.

IT IS SO ORDERED.

DATED: August 23 , 1989.

/s/
D. Lowell Jensen
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF-CALIFORNIA

USS-POSCO INDUSTRIES, et al.,	)	
	)	
Plaintiffs,	)	
	)	C87-4829-DLJ
v.	)	
	)	
CONTRA COSTA BUILDING &	)	ORDER
CONSTRUCTION TRADES	)	AWARDING
COUNCIL, AFL-CIO, et. al.	)	ATTORNEYS'
	)	FEES
Defendants.	)	
	)	

On August 24, 1989, the Court issued its Order Partially granting Defendants' Motion to Strike and Granting Defendants' Motion for Sanctions. The Court found that, notwithstanding the Court's May 1 Order prohibiting repleading of claims upon which summary judgment had been granted, the fourth, fifth and sixth claims of the second amended complaint were so repleaded. The Court further found that this repleading of claims was not warranted by existing law or by a good faith argument for its extension. Pursuant thereto, the Court instructed defendants to submit an accounting of expenses incurred in filing the motion to strike as to the second amended complaint. Counsel for defendants submitted three declarations supporting two claims for attorneys' fees incurred: (1) the firm of Neyhart, Anderson, Nussbaum, Reilly and Freitas ("Neyhart") submitted a claim in the amount of $13,890 based on the Declaration of Victoria Chin, which, after correction of a miscalculation, is adjusted to $13,770; (2) the firm of Van Bourg, Weinberg, Roger and Rosenfeld ("Van Bourg")

submitted a claim for $7;537.50 based on the Declarations of Victor J. Van Bourg and Sandra Rae Benson, which, after correction of a miscalculation, is adjusted to $7,675.00. Plaintiffs submitted a Response to these claims, and defendants filed further declarations in reply.

The Court has considered the papers submitted by counsel and has apportioned the above claims to reflect the time spent in opposing claims found to be repleaded. On that basis the Court ORDERS plaintiffs to pay to defendants their attorneys fees in the following amounts:

1. As to the Neyhart claim, $8,614.50: and

2. As to the Van Bourg claim, $5,291.87.

IT IS SO ORDERED.

DATED: September 29, 1989

/s/
D. Lowell Jensen
United States District Judge

***

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

USS-POSCO INDUSTRIES, et al., Plaintiffs, v. CONTRA COSTA BUILDING & CONSTRUCTION TRADES COUNCIL, AFL-CIO, et al., Defendants.	ORDER STRIKING PORTIONS OF COMPLAINT

On August 24, 1989, the Court issued its order Partially Granting Defendants' Motion to Strike and Granting Defendants' Motion for Sanctions. The Court found that, notwithstanding the Court's May 1 order prohibiting repleading of claims upon which summary judgment had been granted, the fourth, fifth and sixth claims of the second amended complaint were so repleaded. The Court further found that this repleading of claims was not warranted by existing law or by a good faith argument for its extension. Therefore, the Court GRANTED defendants' motion to strike as to the fourth, fifth, and sixth causes of action in the second amended complaint. The Court further GRANTED the motion to strike as to those portions of the first, second, and third causes of action which replead claims removed by the earlier grant of summary judgment. Defendants were instructed to submit a form of order striking specific portions of the first, second and third causes of action, and this form of order was received August 23, 1989. On August 30, 1989, plaintiffs filed an opposition and alternative form of order specifying portions of the

complaint to be struck. Defendants' reply to this opposition was filed September 1, 1989.

Having reviewed the parties' draft orders and supporting briefs, as well as the Courts prior orders and the applicable law, the Court hereby STRIKES the following portions from the first, second and third causes of action in the second amended complaint:

Page	Paragraph	Lines	Portions to Strike
15	25	7-13	"This scheme… shop contractors."
15	27		
16-17	30(a)-(b)		
19-22	31(a)-(c)		
26-27	32(b)(I)		
29	32(b) (xxii)–(xxvi)		
37-38	51-55		
38-40	56-64		
41-43	65-74		
44	Prayer for Relief 1(a)(ii)	8	"Seeking any governmental action or"
44	Prayer for Relief 1(a)(iii)	12	"Seeking any governmental action or"

45	Prayer for Relief 2	1	"Fourth, Fifth and Sixth"

Defendants may file their answer or other response to the second amended complaint with portions struck as ordered above within 20 days from receipt of this Order. Nothing in this Order precludes defendants from bringing appropriate motions to challenge the remaining claims in the second amended complaint.

IT IS SO ORDERED.

DATED: November 20, 1989

/s/
D. Lowell Jensen
United States District Judge

USS-POSCO INDUSTRIES v. TRADES COUNCIL

U.S. District Court,
Northern District of California

USS-POSCO INDUSTRIES, et al. v. CONTRA COSTA BUILDING & CONSTRUCTION TRADES COUNCIL, AFL-CIO, et al., No. C87-4829-DLJ, June 8, 1990

***

Full Text of Opinion

JENSEN, District Judge: — On March 14, 1990, the Court heard defendants' motion for partial summary judgment on the issue of the scope of the statutory labor exemption to the antitrust laws, and to limit discovery in accordance with the scope of the exemption. Appearing for plaintiff BE&K Construction Company ("BE&K") were James G. Gilliland of Khourie, Crew & Jaeger, P.C., San Francisco, California, and Daniel I. Booker of Reed, Smith, Shaw & McClay, Pittsburgh, Pennsylvania (admitted pro hac vice). Appearing for defendants were Victor Van Bourg and Sandra Rae Benson of Van Bourg, Weinberg, Roger & Rosenfeld; and Peter D. Nussbaum of Neyhart, Anderson, Nussbaum, Reilly & Freitas, San Francisco, California.

After review of the briefs submitted by the parties, the oral argument of counsel, and the applicable legal standard, the Court hereby GRANTS the motion for partial summary judgment and limits discovery accordingly, as described below.

I. BACKGROUND

The Second Amended Complaint alleges at the First Claim for Relief that defendants combined and conspired with "other persons both affiliated and not affiliated with any

labor union" to restrain interstate trade and commerce by attempting to force non-union contractors out of construction projects in Contra Costa County, California. Second Amended Complaint ¶35. Such combinations are alleged to have been made in violation of Sections 4 and 14 of the Clayton Act, 15 U.S.C. §§15, 26, and Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2. The unions' defense of this claim is based in part on the statutory exemption from antitrust laws derived from the Clayton Act and the Norris-LaGuardia Act for concerted actions of unions in labor disputes. *See* 15 U.S.C. §17; 29 U.S.C. §52; 29 U.S.C. §§104, 105, 113; *Mine Workers v. Pennington,* 381 U.S. 657, 662, 85 S.Ct. 1585, 1589, 14 L.Ed.2d 626 [59 LRRM 2369] (1965).

This motion is brought to establish the scope of the statutory exemption for purposes of limiting discovery in this action. Plaintiffs argue two theories for imposing antitrust liability on defendants: (1) that defendants conspired with non-labor parties to restrain activities by non-union contractors on construction projects in Contra Costa County; and (2) that certain unilateral activities of defendants violated the National Labor Relations Act and other federal laws and had as their purpose to directly and substantially affect commercial competition in the construction market in Contra Costa County. On this basis, plaintiffs seek to discover facts related solely to the motivations of defendants and affiliated labor groups and the effect of their activities on commerce. Defendants seek to limit discovery to inquiry into possible combinations formed with competitors of plaintiffs for a purpose not growing out of a labor dispute.

II. DISCUSSION

A. Standard for Summary Judgment

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment may be granted when "the

pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the party is entitled to a judgment as a matter of law."

In a motion for summary judgment, "[i]f the party moving for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrates the absence of any genuine issue of material fact," the burden of production then shifts so that "the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, *'specific acts* showing that there is a genuine issue for trial.'" *T.W. Electric Service, Inc. v. Pacific Elec. Contractors,* 809 F.2d 626, 630 [124 LRRM 2575] (9th Cir. 1987) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 2553 (1983); *Kaiser Cement Corp. v. Fischbach & Moore, Inc.,* 793 F.2d 1100, 1103-04 (9th Cir.), *cert. denied,* 107 S.Ct. 435 (1986)) (emphasis in original). Although reference is made to the moving party's "burden" under this rule, it should be noted that Rule 56 places no burden on the defendants beyond that which they require to prevail at trial: the adverse party may not rest on its allegations. *First National Bank v. First Bank Stock Co.,* 306 F.2d 937, 943 (9th Cir. 1962).

When judging the evidence at the summary judgment stage, the Court does not make credibility determinations or weigh conflicting evidence, and is required to draw all inferences in a light most favorable to the non-moving party. *T.W. Electric,* 809 F.2d at 630-31 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S.Ct. 1348, 1356 (1986)). Summary judgment may issue "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.,* 106 S.Ct. at 2552. The standard for judging either a defendant's or plaintiff's motion for summary

judgment is the same standard used to judge a motion for a directed verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-52, 106 S.Ct. 2505, 2512 (1986).

B. The Statutory Labor Exemption from Antitrust Laws.

Two statutes construed together have the express effect of exempting concerted labor party union activity, such as boycotts and second pickets, from liability under the antitrust laws: the Clayton Act §§6, 20, 15 U.S.C. §17 and 29 U.S.C §52; and the Norris-LaGuardia Act, 29 U.S.C. §§104, 105, and 113. Together these provisions create the statutory labor exemption, which, however, does not apply to concerted action or agreements between unions and "non-labor" parties. *Mine Workers,* 381 U.S. at 662, 85 S.Ct. at 1589, *cited in Connell Cost. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100,* 421 U.S. 616, 922, 95 S.Ct. 1830, 1835 [89 LRRM 2401] [(1975).

The Norris-LaGuardia Act bars federal courts from issuing injunctions in cases "involving or growing out of any labor dispute" against persons "participating or interested in such disputes" to prohibit certain acts in promotion of their interest in the dispute, "whether singly or in concert." 29 U.S.C. §104. A "labor dispute" is defined in the Act as "any controversy concerning the terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee." *Id.* §113(c).

The Clayton Act exempts from the antitrust laws activities "lawfully carrying out the legitimate objects of"

labor organizations. 15 U.S.C. §17. Activities specifically included in this exemption are, in addition to work stoppage, "attending at any place where any such person … may lawfully be, for the purpose of peacefully persuading any person to work or to abstain from working;" and in addition to boycotts "recommending, advising, or persuading others by peaceful and lawful means to do so;" as well as "peaceably assembling in a lawful manner, and for lawful purposes." 29 U.S.C. §52.

Therefore, the express language of the statutes, construed together, appears to require that an exemption from antitrust liability rest only on lawful activity carrying out legitimate objectives. However, decisional law has created a buffer for arguably illicit activities serving legitimate union goals by defining two elements of the statutory exemption: (1) who may be a "labor party" involved in a labor dispute with the union; and (2) what ends are legitimate, including using forceful means to gain the opportunity to represent a disputant's employees.

1. The Combination Requirement.

Although axiomatic, it is helpful to begin with the observation that a colorable antitrust claim must allege a combination or conspiracy in restraint of trade or commerce. Sherman Act, 15 U.S.C. §1. The "scope" of the exemption that the parties address is really a determination of whom a labor union might combine with to subject it to civil antitrust liability notwithstanding the statutory exemption. *Cf. Allen Bradley Co. v. Local Union No. 3, Int'l Brotherhood of Electrical Workers,* 325 U.S. 797, 808, 65 S.Ct. 1533 [16 LRRM 798] (1944), *reh. denied,* 326 U.S. 80 (1945) (by creating the statutory labor exemption, "we think Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services.")

[1] The statutory labor exemption arises where two conditions are met: that a challenged combination is with a labor group and that such combination is with the union's "self-interest," "involving or growing out of [a] labor dispute." *U.S. v. Hutcheson,* 312 U.S. 219, 61 S.Ct. 463, 85 L.Ed. 788 [7 LRRM 267] (1941). In the first instance, the Court must consider whether these conditions are mutually dependent, i.e., whether a union's interest may *only* be examined where a combination with non-labor groups occurs, as the unions assert; or whether, as plaintiffs argue, evidence of lack of self-interest (and thus absence of a true labor dispute) defeats the exemption for unilateral union activity. The Court must reject plaintiffs' position, for its necessary corollary is that, because by definition a labor union is a combination of workers seeking to limit wage competition, a single union may conduct activities outside the statutory exemption. Such a reading of the antitrust laws is contrary to the express language of Section 6 of the Clayton Act, which states,

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor [organizations] … instituted for the purposes of mutual help …; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

15 U.S.C. §17. Thus the Supreme Court articulated the policy of the Clayton Act and the Norris-LaGuardia Act:

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under §20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Hutcheson, 312 U.S. at 232. By declining to judge the "wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness" of a union's activities, the Court will necessarily defer consideration of the issue of a valid labor dispute until there is a determination of combination with a non-labor group: for the Sherman Act is not to be a tool of local law enforcement, but is "devoted to quite different ends," i.e., the preservation of fair competition. *Bodine Produce, Inc. v. United Farm Workers Organizing Comm.,* 494 F.2d 541, 559 [85 LRRM 2875] (9th Cir. 1974); *see also, Allen Bradley Co., supra,* 325 U.S. at 810 ("It is also true that the Sherman Act 'draws no distinction between the restraints effeced by violence and those achieved by peaceful … means.'" (quoting *Apex Hosiery Co. v. Leader,* 310 U.S. 469, 513, 60 S.Ct. 982 [6 LRRM 647] (1940).

[2] This reasoning applies as well to violations of statutory restraints on labor under the National Labor Relations Act. That is to say, the Sherman Law is not a means of enforcing labor laws which have their own remedial scheme; rather, it is designed for its own ends and may be invoked along with labor law remedies only where a legitimate threat to competition exists. Therefore, the Court finds that plaintiffs will ultimately bear the burden of showing *both* a combination with non-labor groups *and* an illegitimate purpose in such combination in order to prevail in this action.

2. "Non-Labor Groups."

[3] The courts give a broad definition to "labor group" in order to permit unions to obtain objectives otherwise unlawful under the Sherman Act. Indeed, the net of the "labor group" requirement casts broadly enough to bring in all parties united with the defendant unions' efforts except for those non-labor commercial groups capable of creating business monopolies and controlling the relevant market of goods and services. *See Allen Bradley Co., supra,* 325 U.S. at 807-09. *Accord, Bodine Produce, supra,* 494 F.2d at 558 ("The mere combination by a union with 'non-labor groups' does not violate the Sherman Act. To hold otherwise would invalidate collective bargaining. Whether the combination violates the antitrust laws turns on the purposes served thereby."); *Adolph Coors Co. v. Wallace,* 115 LRRM 3100, 3107 (N.D.Cal. 1984) ("[T]he [union] defendant must not act with, or on behalf of, entities with commercial or competitive goals to that of the targeted plaintiffs."). Most assuredly included in the "labor group" ambit are parties having an economic interrelationship affecting legitimate union interests, even where such parties are not traditional labor organizations. *E.g., H.A. Artists & Assoc. v. Actors' Equity Ass'n,* 451 U.S. 704, 101 S.Ct. 2102 [107 LRRM 2394] (1981) (applying rule of *American Federation of Musicians v. Carroll,* 391 U.S. 99, 106, 88 S.Ct. 1562 [68 LRRM 2230], reh. denied, 393 U.S. 902 (1968), to identify theatrical agents subject to actors' union licensing system as a "labor group" for antitrust analysis purposes).

[4] Therefore, the Court's determination of the scope of the statutory exemption from antitrust liability for labor flows directly from the Supreme Court's longstanding rule stated in *Allen Bradley Co.:* the exemption is destroyed when unions participate in a combination with business

people possessing power to eliminate all competition among themselves and to prevent competition from others. 325 U.S. at 809.

Once a combining party is established to be a non-labor group, as *Bodine, supra,* recognized, a further inquiry is required into the purposes of the combination, on the one hand because the action may not be legitimately in the union's interest and, on the other, because not all combinations with non-labor groups are subject to the antitrust laws.

3. "Labor Dispute."

To retain its statutory exemption, a union combining with a non-labor group must also act in its self-interest, i.e., its activities must "bear a reasonable relationship to a legitimate union interest." *Adams, Ray & Rosenberg v. William Morris Agency,* 411 F.Supp. 403, 410 [92 LRRM 2232] (C.D.Cal. 1976), *quoted in Allied Int'l. Inc., v. International Longshoremen's Ass'n AFL-CIO,* 640 F.2d 1368, 1380 [106 LRRM 2659] (9th Cir. 1981), *aff'd,* 456 U.S. 212 [110 LRRM 2001] (1982).

In barring injunctions of union activities pursuant to a "labor dispute," Section 13 of the Norris-LaGuardia Act broadly defines a "labor dispute" as "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment…". 29 U.S.C. §113(c). Congress deliberately drafted a broad definition to cover a broad range of labor purposes, including political or other non-economic motives, as long as "the employer-employee relationship is the matrix of this controversy." *Jacksonville Bulk Terminals, Inc., v. International Longshoremen's Ass'n,* 457 U.S. 702, 712-13, 102 S.Ct. 2672, 2680 [110 LRRM 2665] (1982).

Under this rule the courts broadly construe what may be a legitimate union purpose behind the alleged combination. Thus, in *Bodine Produce,* an "overwhelmingly predominant purpose" of securing employer recognition of the union supported the legitimacy of the union's entering into boycott agreements with the customers of targeted grape growers. 494 F.2d at 558. Plaintiff's argument that legitimate purposes are only those affecting wage and working conditions of union members — implicitly disregarding the union's self-interest in becoming the bargaining representative for some or all of plaintiff's workers —is far too narrow. In the present action, it is clear that the union's interest in maintaining area wage standards and working conditions forms the matrix of the controversy.

Plaintiffs argue, however, that the union's alleged sham challenges to the construction of the UPI plant on environmental grounds, and the alleged instigation of lawsuits by non-union members cannot be said to relate to a legitimate union interest, because the claimed goals of these actions could not benefit union members. Plaintiffs rely on *H.A. Artists and Allied International.* The Court is not persuaded that these cases are on point with the present action.

In *H.A. Artists,* the Supreme Court considered whether Equity regulation of theatrical agents was "clearly designed to promote the union's legitimate self-interest," and found that it was, except for a single component, the practice of charging the regulated agents a fee to administer the system. 101 S.Ct. at 2111-12. The Court found that on the record there was insufficient evidence that the regulatory system could not exist without the fee, and remanded for further proceedings on that issue. *Id.* at 2113. The Court clearly implied that a fee necessary to the functioning of the inarguably legitimate licensing system would also be legitimate. Thus remand was required simply to assure the integrity of the licensing system and not for a closer

examination of the legitimacy of that system. In the present action, even if some colorable allegation regarding the integrity of union means of pursuing the environmental challenge were offered, an improper element of the challenge would not render the entire environmental challenge itself destructive of the statutory exemption.

Similarly, *Allied International* does not dictate a broad rule that political disputes cannot relate to legitimate union interests, nor could it, in view of the Supreme Court' later holding in *Jacksonville Bulk Terminals* that political or other noneconomic motives do not take an action outside the definition of a "labor dispute." 102 S.Ct. at 2680-81. In *Allied International,* the Ninth Circuit simply upheld without explication the district court's conclusion that the political dispute in that particular case, i.e., protest of the Soviet invasion of Afghanistan, did not relate to a legitimate union interest "as that term has been defined in American labor history and law." 640 F.2d at 1380. The real inquiry, as the *Allied International* court noted, is whether the union's activities had "objectives that are at the heart of national labor policy." *Id.*

The heart of this dispute is a contest between the unions and non-union employers regarding representation of plaintiffs' employees and maintenance of area standards for wages and other working conditions. The statutory labor exemption for antitrust does not require that each dispute in a protracted and complex controversy such as that underlying the present litigation be itself definable as a labor dispute. Rather, it is sufficient that the controversy involve any labor dispute. *See Jacksonville Bulk Terminals,* 102 S.Ct. at 2679 (interpreting the Norris-LaGuardia Act).

It appears that here, as in *Bodine Produce,* the unions' overwhelmingly predominant purpose was with becoming the bargaining representatives of plaintiffs' employees and maintaining established wage rates and working conditions in

Contra Costa County. Therefore, possible noneconomic motives of the unions themselves, distinct from any combination formed with non-labor groups, may not be the subject of discovery in this action.

III. CONCLUSION

[5] For the foregoing reasons, the Court hereby GRANTS the motion for partial summary judgment and finds that the statutory exemption from antitrust liability extends to all combinations made by unions except for those with non-labor parties, i.e., contractors, manufacturers, or other commercial entities involved in the same market for selling construction services as plaintiffs, which combinations are made for any anticompetitive or other purpose not related to legitimate union goals arising from a labor dispute.

Pursuant to this finding, the Court hereby LIMITS the scope of discovery in this action as follows: Discovery in support of the antitrust claim in the Second Amended Complaint shall be limited to inquiry into whether defendants entered into combinations with contractors, manufacturers, or other commercial entities involved in the same market for selling construction services as plaintiffs; and whether such combinations, if an, were made for some anticompetitive or other purpose not related to defendants' legitimate goals of becoming the bargaining representatives for plaintiffs' employees and maintaining area wage rates and working conditions.

A status conference is set in this matter for July 18, 1990, at 9:00 a.m.

IT IS SO ORDERED.

USS-POSCO INDUSTRIES v. TRADES COUNCIL

U.S. District Court,
Northern District of California

USS-POSCO INDUSTRIES, et al. v. CONTRA COSTA BUILDING & CONSTRUCTION TRADES COUNCIL, AFL-CIO, et al., No. C87-4829-DLJ, July 26, 1990

Order clarifying 134 LRRM 2590.

Full Text of Clarification Order

JENSEN, District Judge: — On June 8, 1990, the Court issued an Order Granting Motion for Partial Summary Judgment and Limiting Discovery in this action. Pursuant to the agreement of the parties and the Court at a status conference on July 18, 1990, the June 8 order is hereby clarified as follows:

1. Page 11, Lines 13-15 [134 LRRM Page 2594, Column 1, Lines 38-46]—The last sentence of the paragraph is now to read: "In the present action, a legitimate union interest is that of maintaining area wage standards and working conditions, and such an interest may form the matrix of the controversy."

2. Page 13, Lines 13-17 [134 LRRM Page 2594, Column 2, Second Full Paragraph]—The first sentence of the paragraph is stricken and the following sentence substituted for it: "Therefore, it is sufficient for the unions to assert as a defense that their alleged conduct occurred in connection with a recognized labor dispute—such as a contest to become the representatives of plaintiffs' employees and to maintain area standards for wages and other working conditions—to foreclose discovery into the unions' purpose underlying that conduct."

3. Page 13, Line 17 [134 LRRM Page 2594, Column 2, Second Full paragraph]—The first word of the last sentence in the paragraph ("Therefore,") is stricken so that the sentence now reads: "Possible non-economic motives of the unions themselves, distinct from any combination formed with non-labor groups, may not be the subject of discovery in this action."

IT IS SO ORDERED.

USS-POSCO INDUSTRIES, et al.,	)	
Plaintiffs,	)	
v.	)	No. C-87-4829
CONTRA COSTA COUNTY BUILDING & CONSTRUCTION TRADES COUNCIL, et al.,	)	ORDER
Defendants.	)	

All defendants filed their joint motion for summary adjudication of plaintiff BE&K Construction Company's ("BE&K's") first claim for relief on July 25, 1991. The matter came on for hearing on August 21, 1991. James Gilliland appeared for plaintiff BE&K. Peter Nussbaum appeared on behalf of defendants IBEW Local 302 and USA Local 342. Sandra Benson appeared on behalf of all other labor union defendants.

This motion arises in the context of a suit which has already produced a substantial number of rulings on motions to dismiss and for summary judgment. On July 29, 1988, this Court dismissed plaintiff's first claim for relief from plaintiff's original complaint based on alleged violations of section 8(e) of the National Labor Relations Act. 28 U.S.C. §158(e). On May 1, 1989, the Court granted defendants' motion for partial summary judgment, eliminating plaintiff's claim that defendants had subjected plaintiff to sham litigation. Finally, on June 8, 1990, the Court granted defendants' motion for partial summary judgment restricting the scope of plaintiff's anti-trust claims against the defendant unions.

The present motions for summary judgment were filed on July 24 and July 25, 1991. In it pleadings filed in response to defendants' motion, and again at the hearing, plaintiff

BE&K stated its non-opposition to defendants' motion. In particular, plaintiff BE&K contended that the outcome of this motion would be controlled by the prior orders of the Court, especially the Court's Order of June 8, 1990. In light of these prior orders, and to expedite its own plans for appeal, BE&K does not oppose the defendants' motion.

In light of BE&K's non-opposition, and in light of the reasons expressed in the prior Orders of this Court, the Court GRANTS defendants' motion for summary adjudication of BE&K's first claim for relief.

IT IS SO ORDERED.

Dated: September 4, 1991.

/s/
D. Lowell Jensen
United States District Judge

***

IN THE UNITED STATES DISRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

USS-POSCO INDUSTRIES, a California General partnership, et al., Plaintiffs, vs. CONTRA COSTA COUNTY BUILDING & CONSTRUCTION TRADES COUNCIL, AFL-CIO, a voluntary, unincorporated Association, et al., Defendants.	No. C87-4829 DLJ ORDER FOR THE ISSUANCE OF FINAL JUDGMENT

WHEREAS, this Court has previously granted Summary Judgment in favor of Defendants and against Plaintiffs[1] in connection with the Fourth Claim for Relief of the Second Amended Complaint (LMRA § 303 [Toxic Waste Ordinance]), the Fifth Claim for Relief of the Second Amended Complaint (LMRA § 303 [the Piledrivers' litigation]), and the Sixth Claim for Relief of the Second Amended Complaint (LMRA § 303 [Grievance Proceedings]); and

[1] Plaintiff USS-POSCO Industries previously dismissed this action with prejudice as to its claims against defendants. Therefore, BE&K Construction Company is the only remaining plaintiff in this litigation.

WHEREAS, the Court has previously granted Defendants' Motion for Partial Summary Judgment as to Plaintiff's First Claim for Relief of the Second Amended Complaint (Antitrust Claim Under §§4 and 14 of the Clayton Act and §§1 and 2 of the Sherman Act); and

WHEREAS, the Court has previously dismissed with prejudice the Second Claim for Relief of the Second Amended Complaint (LMRA §303 [Hot Cargo/Secondary Boycott Violations]) and the Third Claim for Relief of the Second Amended Complaint (LMRA §303 [Picketing, Handbilling and Work Stoppages]), pursuant to Plaintiff's Motion for a Voluntary Dismissal with prejudice of these claims, and pursuant to Plaintiff's agreement that by so doing, it waives its right to appeal as to any matters contained in those claims which were not the subject of previous orders of this Court; and

GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED THAT:

A Final Judgment shall issue in this case in favor of Defendants and against Plaintiffs and awarding those Defendants represented by Van Bourg, Weinberg, Roger and Rosenfeld their costs of suit in the amount of $4,914.22 and awarding those Defendants represented by Altshuler, Berzon, Nussbaum, Berzon & Rubin their costs of suit in the amount of $395.24, as reflected on the Cost Bills filed by the respective firms.

DATED: February 11, 1992

/s/
D. LOWELL
JENSEN
JUDGE OF THE
UNITED STATES
DISTRICT COURT

APPROVED AS TO FORM:

VAN BOURG, WEINBERG, ROGER & ROSENFELD

By /s/
SANDRA RAE BENSON
Attorneys for Defendants
Contra Cost Building Trades Council,
Piledrivers Union, Local 34, Bay Counties
District Council of Carpenters, Operating
Engineers Union, Local 3, Iron Workers
Union, Local 378, District Council of Iron
Workers of the State of California and Vicinity,
Plasterers and Cement Masons
Local 825, District Council of Plasterers
& Cement Masons, Northern California
District Council of Laborers, and
International Brotherhood of Boilermakers,
Local 549

ALTSHULER, BERZON, NUSSBAUM, BERZON & RUBIN

By /s/
PETER D. NUSSBAUM
Attorneys for Defendants
Steamfitters Local Union No. 342 and
International Brotherhood of Electrical
Workers Local 302

KHOURIE, CREW & JAEGER

By /s/
MICHAEL N. KHOURIE

LITTLER, MENDELSON, FASTIFF & TICHY
By: /s/
RICHARD A. LEASIA

REED, SMITH, SHAW & McCLAY

By /s/
DANIEL I. BOOKER
Attorneys for Plaintiff
BE&K Construction Company

USS-POSCO v. TRADES COUNCIL

U.S. Court of Appeals,
Ninth Circuit (San Francisco)

USS-POSCO INDUSTRIES and BE&K CONSTRUCTIUON COMPANY v. CONTRA COST COUNTY BUILDING & CONSTRUCTION TRADES COUNCIL, AFL-CIO, et al., No. 92-15497, July 26, 1994

***

Appeal from the U.S. District Court for the Northern District of California. Affirmed in part and reversed in part. See also 134 LRRM 2590 and 136 LRRM 2647.

***

Before KOZINSKI, THOMPSON, and THOMAS G. NELSON, Circuit Judges.

Full Text of Opinion

KOZINSKI, Circuit Judge: — We explore the nether reaches of two areas of antitrust law: the statutory labor exemption and the *Noerr-Pennington* doctrine.

I

USS-POSCO Industries (UPI) is a joint venture between USX Corporation (formerly U.S. Steel) and Pohang Iron and Steel Co. of South Korea, formed to modernize and operate an old steel facility in Pittsburg, California (PITCAL). Interested unions allegedly attempted to coerce UPI into awarding the general contract to a unionized contractor. After bidding, UPI nevertheless awarded the $350 million construction contract—involving over 800 jobs— to appellant BE&K, a merit-shop contractor. See Henry

Weinstein, *Workers Are Steeling Themselves to Fight Non-UnionUupgrading of Pittsburgh Plant*, L.A. Times, Mar. 16, 1987, at 3.

BE&K alleges the unions then began a campaign to eliminate non-union construction in Northern California by making an example of PITCAL. Although none of the unions had a collective bargaining agreement with BE&K, defendants allegedly filed automatic protests to BE&K's permits in order to cause it gratuitous expense and delay; lobbied for a local toxic waste disposal ordinance that would require BE&K to obtain more permits; sued to enforce the ordinance at the PITCAL site; encouraged BE&K's subcontractors to protest nonexistent safety violations; brought suit against BE&K for allegedly violating environmental laws (the P*iledrivers* suit); and brought numerous grievances, arbitrations and enforcement proceedings against BE&K's partner, Eichleay Constructions, Inc. (the *Eichleay* actions). According to BE&K, the unions' purpose was not to organize BE&K's employees, but to cause such delay and expense that future project owners would only hire unionized contractors and subcontractors.

UPI and BE&K originally brought suit alleging unfair labor practices under the LMRA, and the unions defended on the ground that their lobbying efforts, the *Piledrivers* suit and the *Eichleay* actions were immunized from LMRA liability under the *Noerr-Pennington* doctrine. *See Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (113 LRRM 2647) (1983) (applying *Noerr-Pennington* to labor context); *see also Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*,365 U.S. 127, 144 (1961) (legitimate petitioning of government immunized from antitrust laws). Rejecting BE&K's argument that the suits fell within the sham exception to *Noerr-Pennington*, the district court found that the lobbying of state and local bodies and the *Eichleay* actions were valid attempts to petition the government. After

discovery, the court granted partial summary judgment for the unions. ER 199.

BE&K filed an amended complaint which realleged the above-described conduct, this time claiming that it violated the Sherman and Clayton Antitrust Acts.[1] The court granted the unions' subsequent motion to dismiss on the ground that the amended complaint was foreclosed by the prior partial summary judgment. BE&K then filed its second amended complaint, basing it in part on the same activities the district court had ruled were protected by *Noerr-Pennington*. The court granted the unions' motion to strike those portions of the complaint dealing with the toxic waste ordinance, the *Piledrivers* suit and the *Eichleay* grievances. It also imposed Rule 11 sanctions on BE&K. ER 235 at 8-10.

The unions then advised the district court they intended to seek partial summary judgment on the antitrust claim on the ground that the surviving allegations involved activities protected by the statutory labor exemption. The court ruled that, in order to overcome the statutory exemption, BE&K would have to prove "*both* a combination with non-labor groups *and* an illegitimate purpose in such combination." ER 283 at 8 (emphasis added). The court then limited BE&K's discovery to the first of these elements. Because BE&K was unable to show a triable issue of fact as to whether there was a combination non-labor groups, the court granted the unions' subsequent motion for partial summary judgment.

BE&K stipulated to dismissal of its remaining claims with prejudice. It appeals only the antitrust claims and the imposition of sanctions.

1 UPI voluntarily dismissed its complaint against all defendants in February 1990, and is no longer a party to this suit. *See Firm, Building Trade, Settle Feud Over Environmental Concerns at Steel Plant*, Daily Lab. Rep. (BNA), Mar. 1, 1990 at A-8.

II

In *United States v. Hutcheson*, 312 U.S. 219, 232 (7 LRRM 267) (1941), the Supreme Court examined the "interlacing" Sherman, Clayton and Norris-LaGuardia Acts, and held that they gave unions a statutory exemption to the antitrust laws:[2]

> So long as a union *acts in its self-interest and does not combine with non-labor groups,* the licit and the illicit…are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Hutcheson, 312 U.S. at 232 (emphasis added). This passage has been read as establishing a two-prong test for the statutory labor exemption: (1) Did the union combine with a non-labor group? (2) Did the union act in its legitimate self-interest? *See, e.g., United Mine Workers of America v. Pennington*, 381 U.S. 657, 662 [59 LRRM 2369] (1965); *Allen Bradley Co. v. Local No. 3, IBEW*, 325 U.S. 797, 806-07 [16 LRRM 798] (1945); *Bodine Produce, Inc. v. United Farm Workers Org. Comm.*, 494 F.2d 541, 557-58 [85 LRRM 2875] (9th Cir. 1974). A key question in this case is whether these two prongs of *Hutcheson* are to be read in the conjunctive (*i.e.*, that plaintiff must establish both elements in order to the around the exemption), or in the disjunctive (*i.e.*,

[2] There is also a non-statutory exemption for agreements between unions and employers that are intimately related to the union's vital concern with wages, hours and working conditions. *Connell Construction Co. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616, 622 (89 LRRM 2401) (1975); *Richards v. Nielsen Freight Lines*, 810 F.2d 898, 905 [9124 LRRM 2788] (9th Cir. 1987). As no such collective bargaining relationship existed here, the non-statutory exemption is not at issue.

that plaintiff can bypass the exemption by proving either element).

The district court read the *Hutcheson* test in the conjunctive and granted summary judgment on the antitrust claim because BE&K was unable to establish a triable issue of fact as to the first element—whether the unions had combined with non-labor groups. BE&K appeals this ruling, arguing first, that the district court defined non-labor group too narrowly; and second, that BE&K should have been allowed to show the union acted for an improper purpose, as an alternative avenue for defeating the statutory labor exemption.[3]

[3] BE&K also complains that the district court improperly assigned to it the burden of proving that the statutory labor exemption did not apply, since defendants normally bear the burden of proving exceptions to the antitrust laws. *See Feather v. UMWA*, 711 F.2d 530, 542 [113 LRRM 3367] (3rd Cir. 1983); *Consolidated Express, Inc. v. New York Shipping Ass'n*, 602 F. 2d 494, 521 [100 LRRM 3170] (3d Cir. 1979), *vacated on other grounds*, 448 U.S. 902 [104 LRRM 2687] (1980); 9 Julian O. Von Kalinowski, *Antitrust Laws and Trade Regulation*, §81.09(2) (1993). But the statutory exemption is not an affirmative defense; it's an element of any claim that unions violated the antitrust laws. Plaintiff bears the burden of proof. *See Pennington*, 381 U.S. at 669 ("the alleged agreement between UMW and the large operators…. if proved, was not exempt from the antitrust laws"); *Richard's*, 810 F.2d at 902 ("(f)ailure on the part of the plaintiff to produce evidence from which a jury could infer reasonably that conduct was conspiratorial, not unilateral, will lead to summary judgment for the defendant"); *Bodine Produce*, 494 F.2d at 561 (plaintiff must specifically allege non-labor group combination); *Mid-America Regional Bargaining Ass'n v. Will County Carpenters Dist. Council*, 675 F.2d 881, 886 (110 LRRM 2143) (7th Cir. 1982) ("if the defendants' conduct is to fall outside the statutory exemption, the plaintiffs must allege a conspiracy under *Allen Bradley*"). *But see United States Steel Corp. v. Fraternal Ass'n of Steelhaulers*, 431 F.2d 1046, 1051 [75 LRRM 2208] (3d Cir. 1970) (union failed to meet burden of proving element of statutory exemption).

A. What constitutes a non-labor group for purposes of antitrust laws has never been very clearly defined.[4] It is possible, however, to derive a fair approximation of what the term means based on certain common-sense observations.

On the one hand, when a labor union combines with an entity that is competing in the plaintiff's market, this normally is deemed to be a combination with a non-labor group, stripping the union of the statutory labor exemption. *But see* n.5 *in/ra*. Thus, in most statutory labor exemption cases, the focus has been on whether the union combined with a competitor of the targeted employer. *See, e.g., H.A. Artists*, 451 U.S. at 715 (discussing non-labor group as "one or more employer"); *Federal Maritime Comm'n v. Pacific Maritime Ass'n*, 435 U.S. 40, 51 n.15 (97 LRRM 2809) (1978) (consideration whether there is "combination with nonlabor groups, i.e., whether there is not conspiracy with

[4] Indeed, the case law is saturated with confusing formulations. *See Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 457 U.S. 702, 721 [110 LRRM 2665] (1982) (labor group depends on "the presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests") (quoting *American Federation of Musicians v. Carroll*, 391 U.S. 99, 106 [68 LRRM 2230] (1968); *H.A. Artists & Assocs. V. Actors' Equity Ass'n*, 451 U.S. 704, 717 [107 LRRM 2394] (1981) ("nonlabor group" consists of "persons who are not parties to a labor dispute" within the meaning of the Norris-LaGuardia Act) (quoting *Hutcheson*, 312 U.S. at 232); *Allen Bradley*, (1982) (labor group depends on "the presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests") (quoting *American Federation of Musicians v. Carroll*, 291 U.S. 99, 106 (68 LRRM 2230) (1968)); *H.A. Artists & Assocs. V. Actors' Equity Ass'n*, 451 U.S. 704, 717 (107 LRRM 2394) (1981) ("nonlabor group" consists of "persons who are not 'parties to a labor dispute'" within the meaning of the Norris-LaGuardia Act) (quoting *Hutcheson*, 312 U.S. at 233); *Allen Bradley*, 325 U.S. at 798, 81, 809 (union lost statutory exemption where it combined with "employers and manufacturers of goods" to "aid and abet business men to do the precise things which the Act prohibits"; "when (a union participates) with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation (is) created not included within the exemptions of the Clayton and Norris-LaGuardia Acts").

management"); *Pennington*, 381 U.S. at 665-66 (union forfeited statutory exemption where it "agree(s) with one set of employers" to eliminate competition from the industry); *Allen Bradley*, 325 U.S. at 811 ("Congress evidently concluded…that the chief objective of antitrust legislation, preservation of business competition could be accomplished by applying the legislation primarily only to those business groups which are directly interested in destroying competition."); *Bodine*, 494 F.2d at 560 ("alliance between the defendant union and non-labor business groups engaged in competition with the plaintiffs" constituted combination with non-labor group); see also Phillip Areeda & Donald F. Turner, *Antitrust Law* ¶229e (1978).

At the other end of the spectrum, labor unions carrying out their normal functions must be free to hire law firms, contract for lease space and negotiate with other business entities, without risking antitrust liability. Even though many of the entities that unions deal with on a daily basis cannot fairly be described as labor groups, they are not deemed "non-labor groups" for purposes of the statutory labor exemption. Were it otherwise, this requirement—which lies at the heart of the test announced by *Hutchenson*—would be rendered utterly meaningless in the sense that *everything* unions do would become a combination with a non-labor group and possibly subject to antitrust liability.

To allow unions breathing space in carrying out their legitimate functions without giving them free reign to extend their substantial economic power into markets for goods and services other than labor, we conclude that the definition of non labor group must not stray too far from the paradigm of the union combining with the employer's competitors. To constitute a non-labor group for purposes of the statutory labor exemption, therefore, the entity in question must operate in the same market as the plaintiff to a sufficient degree that it would be capable of committing an antitrust violation against the plaintiff, quite independent of the

union's involvement. *See R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 148 (9th Cir. 1989) (en banc) ("The requirement that the alleged [antitrust] injury be related to anticompetitive behavior requires, as a corollary, that the injured party be a participant in the same market as the alleged male-factors.") (quoting *Bhan v. NME Hospital, Inc.*, 772 F.2d 1467, 1470 (9th Cir. 1985)); *see also Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 539 [112 LLRM 2753] (1983); Areeda & Hovenkamp, Antitrust Law at 400 ¶334.1b (1993 Supp.)

As noted, a competitor of the plaintiff clearly falls within that definition, as would a supplier or purchaser of the plaintiff's goods or services. *See, e.g., E.W. French & Sons, Inc. vs. General Portland, Inc.*, 885 F.2d 1392 (9th Cir. 1989) (ready-mix concrete supplier bringing antitrust suit against cement producer); *Zidell Explorations, Inc. v. Conval Int'l Ltd.*, 719 F.2d 1465 (9th Cir. 1983) (distributor of valves bringing antitrust action against suppliers). Other entities, though more remote, may nevertheless stand in such a relationship to the plaintiff that they are deemed to be operating in the same market. *See, e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988) (antitrust suite by manufacturer against private standard-setting organization); *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992) (antitrust class action by title insurance consumers against insurers for participation in state-licensed rating bureaus). When the union combines with such an entity, it loses the protections of the antitrust exemption.[5]

[5] There appears to be at least one exception to this general rule. In some cases, a party that would otherwise meet the definition of a "non-labor group" was considered a "labor group" because of an "economic interrelationship" between that party and the union. *See, e.g., Jacksonville Bulk Terminals*, 457 U.S. at 721 (status as "labor group" depends on "whether there is 'some…economic interrelationship affecting legitimate union interests'"); *Carrol*, 391 U.S. at 106 ("labor group"

BE&K took discovery on this issue and, although the initial order seemed to restrict discovery to BE&K's competitors, ER 283 at 14, the court subsequently explained that it did not mean to "cut off any discovery reasonably designed to identify contractors, manufacturers or other commercial entities with whom the defendants may have formed illegal combinations." IBEW SER 304 at 3. This was sufficiently broad to allow BE&K to identify anyone falling under the definition of non-labor group as explicated above, but BE&K has been able to point to no such entity. We therefore agree with the district court that BE&K has failed to raise a material issue of fact as whether the unions combined with nonlabor groups, and therefore did not carry its burden under this prong of the *Hutcheson* test.

The district court didn't allow BE&K discovery on the alternate prong of *Hutcheson* because it took the view that failure as to one prong was fatal to BE&K's case. In its most recent pronouncement on the subject, however, the Supreme Court clearly held that a union that combines only with other labor groups may nonetheless lose the statutory exemption under the second prong of *Hutcheson*. *H.A. Artists & Assocs. v. Actors' Equity Ass'n*, 451 U.S. 704 [107 LRRM 2394] (1981), involved a challenge under the Sherman Act to certain rules of the Actors' Equity Union, including the exaction of a franchising fee from theatrical agents licensed by the union.

The Supreme Court first inquired whether there was a combination between the union and any "non-labor groups," or persons who are not "parties to the labor dispute." *Id.* at 717. The Court found that the theatrical agents were not a "nonlabor group" for purposes of the statutory exemption.

---

characterized by "job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members" and the purported "labor group"); *accord H.A. Artists*, 451 U.S. at 718.

Id. Had this been sufficient to establish the union's entitlement to the labor exemption, the Court could have stopped right there. Instead, it proceeded to evaluate whether the union's activities were undertaken in pursuit of its legitimate self-interest. While it found the union's activity generally exempt because the regulations were "clearly designed to promote the union's legitimate self-interest," *id.*, at 721, it found "the fees that [the union] levie[d] upon the agents" might not be a "permissible component of the exempt regulatory system," *id.* at 722. Because no evidence had been presented at trial "to show that the costs justified the fees actually levied," *id.* at 712, the case was remanded for further factfinding.

Had the Court in *H.A. Artists* eventually approved all aspects of the arrangement between the union and the agents, its examination of the fee structure might have been explainable on a belt-and-suspenders rationale. But the court found fault with the fee structure—or at least found that there might be fault. Since *H.A. Artists* was an antitrust case, the only possible fault could be a violation of the antitrust laws. We read this as a clear holding that a union may violate the antitrust laws in other words, that it may lose the benefit of the labor exemption—even when it does not combine with a non-labor group. Although, prior to *H.A. Artists,* there was some doubt on this point,[6] there no longer is. *See* Daralyn J.

[6] Some cases had suggested that the union must combine with a non-labor group as a predicate for antitrust liability. In *Allen Bradley*, 325 U.S. at 810, the Court explained that whether union activities violated the Sherman Act was "dependent upon whether the union acts alone or in combination with business groups." *See, e.g., Hunt v. Crumboch*, 325 U.S. 821 [16 LRRM 808] (1945) (unilateral actions of union to drive petitioner out of business are immune from Sherman Act liability); *Embry-Riddle Aeronautical Univ. v. Ross Aviation, Inc.*, 504 F.2d 896, 903-04 [87 (LRRM 3041] (5th Cir. 1974) ("A Union can, without forfeiting the exemption...act with a purpose to injure or even eliminate the business of an employer...What makes the exemption disappear is sufficient proof of a *concerted* purpose, between the union and a favored employer.") (emphasis in original); *Bodine Produce*, 494 F.2d at 550

Durie and Mark A. Lemley, *The Antitrust Liability of Labor Unions for Anticompetitive Litigation*, 80 Cal. L. Rev. 757, 783 & n.155 91992).

What, then, does it mean for a union to pursue an illegitimate purpose? In the broadest sense, everything a union does serves its self-interest. But *Hutcheson* requires that it act in pursuit of its legitimate self-interest. Whether the interest in question is *legitimate* depends on whether the ends to be achieved are among the traditional objectives of labor organizations. Thus, if a union forces employers to funnel money into a commercial enterprise from which the union derives profits; or if it forces the employer to hire the union president's spouse; or if a union is involved in illegal activities unrelated to its mission, such as dealing drugs or gambling, those would not be objectives falling within the union's legitimate interest. In such cases, the unions "cease to act as labor groups." *Jacksonville Bulk Terminals,* 457 U.S. at 714.

Of course, the *means* employed by the union bear on the degree of scrutiny we will case on the legitimacy of the union's interest. *See Local No. 189, Amalgamated Meat*

("Following *Hutcheson*, the issue became primarily one of whether there existed an improper combination with nonlabor groups.").

Other cases had suggested that illegitimate purpose alone might bring a union outside the statutory exemption. *See, e.g., Jacksonville Bulk Terminals* 457 U.S. at 714 ("the protections of [the statutory labor exemption] do not extend to labor organizations when they cease to act as labor groups or when they enter into illegal combinations with non-labor groups in restraint of trade") (emphasis added); "*Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368, 1380 & n.12 [106 LRRM 2659] (1st Cir. 1981) (although ILA didn't conspire with any non-union group, its boycott of Soviet cargo was not immunized by statutory exemption because it didn't relate to "legitimate union interest"), *aff'd*, 456 U.S. 212 [110 LRRM 2808] (1982); *Bodine*, 494 F.2d at 553 (activities of non-labor group combination remain within statutory exemption because union was pursuing own interests).

Cutters & Butcher Workmen v. Jewel Tea Co., 381 U.S. 676, 689-90 [59 LRRM 2376] (1965) (plurality opinion) (restraints on the product market must be "so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act"). Thus, where a union engages in activities normally associated with labor disputes, *see, e.g.*, 29 U.S.C. §104,[7] these will be presumed to be in pursuit of the union's legitimate interest absent a very strong showing to the contrary. *See, e.g., Bodine Produce*, 494 F.2d at 557 (group boycott and demands for recognition were "intimately related to wages, hours, and working conditions which…places it within the protection of national labor policy and exempt from the Sherman Act"). Where the union's activities are farther afield, the scrutiny is more searching. *See, e.g., H.A. Artists*, 451 U.S. at 722 (examining whether franchise fees are sufficiently related to legitimate union ends); *Carroll*, 391 U.S. at 112 ("the price-list requirement is brought within the labor exemption under the finding that the requirement is necessary to assure that scale wages will be paid to the sidemen and the leader").

H.A. Artists casts a highly instructive light on this issue. The activity there-collection of franchise fees from the agents for the direct benefit of union members - was not a traditional union activity; it looked like the union may have been using its bargaining power with theatrical agents to generate a

[7] Congress has provided special protection for certain traditional union activities in 29 U.S.C. §104, which, *inter alia*, prohibits restraining orders or injunctions where persons involved in a labor dispute engage in work stoppage, publicize the existence or facts of their dispute, assemble or organize to promote their interest in the dispute, advise or notify persons of their intent to do any of these acts, or advise, urge, cause or induce without fraud or violence any of these acts.

collateral source of revenue. The Court did not say the franchise fees violated the antitrust laws per se, but placed a substantial burden on the union to prove why this method of collecting revenues was not merely convenient but necessary. "[W]ithout the fees…," the Court reasoned, "the dues of [the union's] members would perhaps have to be increased to offset the loss of a general revenue source," but there was "no reason to believe that any of its legitimate interests would be affected." 451 U.S. at 722. The Court's concern thus seemed to be that the union may have funneled the market power granted to it by labor laws into a money-making enterprise. That the money would then be used to finance labor-related activities was not, in the Court's view, exculpatory, unless the union could show it could not achieve those objectives some other way.

Many of the activities of which BE&K complains are traditional organizational activities, closely related to traditional union ends. For example, the unions allegedly "picketed and handbilled the plaintiffs' premises" after BE&K refused to "recognize them as the exclusive collective bargaining representative for the employees of BE&K and its sub contractors, and enter into a collective bargaining agreement with the defendants…" SAC ¶¶31(e)(i), (iii). And the unions encouraged work stoppages by unionized employees because of well-founded safety concerns at the project site. *See* Contra Costa SER 3-5, 316-40; 348-52.[8]

That these activities were not undertaken to unionize this particular employer but in order to eliminate non-union shops altogether by making an example of BE&K does not matter. *See Pennington*, 381 U.S. at 666 ("a consequence of [legitimate] union activity may be to eliminate competition

[8] BE&K also vaguely alleged that there were violent pickets. But violence alone is not sufficient to turn protected conduct like labor picketing into an antitrust violation. *See Apex Hosiery Co. v. Leader* 310 U.S. 489, 513 (6 LRRM 647) (1940); *Bodine Produce*, 494 F.2d at 559.

based on differences in [labor] standards"); *Bodine Produce*, 494 F.2d at 549 (unions' purpose is "to eliminate competition based on differences in labor standards"). Encouraging the use of unionized labor is an objective well within the legitimate interests of labor unions and, so long as this end is pursued by activities normally associated with labor disputes, there's a strong presumption that the unions are protected from antitrust liability by the statutory labor exemption.

More troublesome are certain other activities allegedly undertaken by the unions, such as pressing frivolous lawsuits, automatically protesting against permits sought by BE&K, pressing for the passage of a regulatory measure and then agitating for its enforcement against BE&K - all allegedly to make an example of BE&K and discourage use of merit shop contractors by parties such as UPI. Taking a cue from *H.A. Artists,* we cannot say that pursuing legitimate labor goals through this kind of activity is per se exempted from the antitrust laws. *See* Durie & Lemley, 80 Cal. L. Rev. at 759-62 (using BE&K as case study). The question here, as in *H.A. Artists*, is whether the non-traditional means were appropriate-in other words, whether the non-traditional means were not only lawful, but necessary because the goals could not be achieved through traditional tactics. And the burden to show this lies with the unions. *See H.A. Artists*, 451 U.S. at 722.

Because the district court erroneously construed *Hutcheson's* two-part test in the conjunctive, it did not allow discovery. In this, we conclude, the district court erred. Plaintiff was entitled to try to raise a triable issue of fact on this point by gathering evidence in support of its allegations.

III

That's not the end of the matter, however, because the unions raise another defense. The *Noerr-Pennington* doctrine provides broad antitrust protection for those who "petition the

government for a redress of grievances." *City of Columbia v. Omni Outdoor Advertising, Inc.* [499 U.S. 365], 111 S.Ct 1344, 1953 (1991) (quoting First Amendment). This protection extends to lobbying of government officials, *Noerr Motor Freight, Inc.*, 365 U.S. at 144, and petitioning of administrative agencies and courts, *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 510 (1972). In those contexts, immunity from antitrust is lost only if a party engages in "sham" petitioning.

BE&K argues that the unions engaged in a pattern of "automatic petitioning of governmental bodies… without regard to and regardless of the merits of said petitions." SAC ¶27; *see also id.* at ¶32(a) (alleging that unions filed "a series of overlapping, repetitive and sham lawsuits against plaintiffs, their employees and attorneys… *with or without probable cause and regardless of the merits* of the claims asserted therein") (emphasis added); *id.* at ¶30(a) (describing published article by the Business Manager of the Contra Costa Building Trades Council describing a computer system through which "all permits for known nonunion contractor would automatically be protested, regardless of size or amount of permit"). BE&K relies on *California Motor Transport Co. v. Trucking Unlimited*, where the Supreme Court held the allegations "that petitioners 'instituted the proceedings and actions…with or without probable cause, and regardless of the merits of the cases,'" 404 U.S. at 512, where "[o]n their face…within the 'sham' exception," *id.* at 516.

The unions counter that the Supreme Court's most recent pronouncement on the sham exception forecloses reliance on *California Motor Transport.* In *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 113 S. Ct. 1920, 1928 (1993), the Court set out a two-part test for sham litigation: First, the suit must be "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits"; second, the baseless lawsuit must

conceal "'an attempt to interfere *directly* with the business relationships of a competitor.'" *Id.* at 1928 (quoting *Noerr*, 365 U.S. at 144) (emphasis in original). The two parts of the test operate in succession: Only if the suit is found to be objectively baseless does the court proceed to examine the litigant's subject intent. *Id.*; *Liberty Lake Investments, Inc. v. Magnuson*, 12 F.3d 155 (9th Cir. 1993). Under this two-prong test, the unions argue, BE&K must show that each individual suit the unions brought was objectively baseless-a task it abandoned by phrasing the question on appeal as follows: "Whether litigation that *is not objectively baseless* can still constitute 'sham litigation' sufficient to eliminate... *Noerr-Pennington* immunity." BE&K Opening Br. at 1 (emphasis added).

We're not persuaded that *Professional Real Estate Investors* effectively overrules *California Motor Transport*. Far from criticizing or limiting *California Motor Transport*, the *Professional Real Estate Investors* majority cited it with approval. The Court acknowledged that the cases dealt with different questions and noted that "nothing in *California Motor Transport* retreated from the[ ] principle[ ]" that "unprotected activity [must] lack objective reasonableness...regardless of intent or purpose." 113 S.Ct. at 1926-27.

We reconcile these cases by reading them as applying to different situations. *Professional Real Estate Investors* provides a strict two-step analysis to access whether a single action constitutes sham petitioning. This inquiry is essentially retrospective: If the suit turns out to have objective merit, the plaintiff can't proceed to inquire into subjective purpose, and the action is perforce not a sham. *See* 113 S.Ct. at 1928 & n.5.

California Motor Transport deals with the case where the defendant is accused of bringing a whole series of legal proceedings. Litigation is invariably costly, distracting and

time-consuming; having to defend a whole series of such proceedings can inflict a crushing burden on a business. *California Motor Transport* thus recognized that the filing of a whole series of lawsuits and other legal actions without regard to the merits has far more serious implications than filing a single action, and can serve as a very effective restraint on trade. When dealing with a series of lawsuits, the question is not whether any one of them has merit — some may turn out to, just as a matter of chance — but whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival. The inquiry in such cases is prospective: Where the legal filings made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment?

The allegations in BE&K's complaint track the language of *California Motor Transport* and, if proven, would be sufficient to overcome the unions' *Noerr-Pennington* defense. The record, as developed to date, however, forecloses any possibility that BE&K could substitute its claim. As noted, the fact that a small number in the series of lawsuits turn out not to be frivolous will not be fatal to a claim under *California Motor Transport*; even a broken clock is right twice a day. Here, however, fifteen of the twenty-nine lawsuits alleged by BE&K as part of the pattern of filings "without regard to the merits" have proven successful.[2] The fact that more than half of all the actions as to which we know the results turn out to have merit cannot be reconciled with the charge that the unions were filing

[2] The twenty-nine actions are listed in paragraph 32(b) of the Second Amended Complaint. BE&K lists separately seven suits in federal court and eight arbitration actions the unions filed against Eichleay Corporation. All were successful and ultimately enforced by the Third Circuit in *Eichleay Corp. v. International Assoc. of Bridge, Structural and Ornamental Iron Workers*, 944 F.2d 1047 [137 LRRM 2781] (1991).

lawsuits and other actions willy-nilly without regard to success. Given that the plaintiff has the burden in litigation, a batting average exceeding .500 cannot support BE&K's theory. BE&K therefore cannot sustain its burden of showing that the union's conduct falls within the sham exception to the *Noerr-Pennington* doctrine.[10]

IV

Finally, BE&K challenges the sanctions awarded against it by the district court because of its persistent reincorporation of stricken parts of the complaint in the amended complaints. The district court found that BE&K "clearly violated the Court's... Order by repleading causes of action for which summary judgment was granted for defendants." Order of 8/24/89 at 9. BE&K responds that it repleading was required by our decision in *London v. Coopers & Lybrand*, 644 F.2d 811, 814 [26 FEP Cases 755] (9th Cir. 1981), which held that "a plaintiff waives all causes of action alleged in the original complaint which are not alleged in the amended complaint." *Accord King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

BE&K's lawyers could not find no case applying this rule where the amended complaint was filed after summary judgment rather than after motion to dismiss. Nonetheless, they claim a good faith belief that they were required to replead the claims on which the court had granted summary judgment in order to preserve them for appeal.

We agree with the district court that the *London* rule only applies to amended complaints that follow upon dismissal with leave to amend, and not to those that follow

[10] Before us, the unions have moved for sanctions on the ground that BE&K's continued prosecution of this issue after the Supreme Court decided *Professional Real Estate Investors* was frivolous. We obviously disagree.

summary judgment. Nonetheless, we have found no case drawing this distinction. Counsel were not required to risk forfeiting their client's right to appeal in order to avoid sanctions. BE&K's reading of *London* is not frivolous and, in the absence of authority on point, counsel's decision to err on the side of caution cannot be faulted.

* * *

We conclude that unions can forfeit the statutory labor exemption even without combining with non-labor groups if the union acts outside this legitimate self-interest. While most of the union's activities alleged here were protected by the statutory labor exemption, the lawsuits, permit protests and lobbying activities allegedly designed to make an example of BE&K may not have been. The district court therefore erred by precluding discovery into whether these means were intimately related to legitimate union ends. Nonetheless, the error was harmless because these petitioning activities were protected from antitrust liability under the *Noerr-Pennington* doctrine. We also reverse the award of sanctions against BE&K.

AFFIRMED IN PART; REVERSED IN PART.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

USS-POSCO Industries, A California general partnership, Plaintiff, and BE&K CONSTRUCTION COMPANY, A Delaware Corporation, Plaintiff-Appellant	)
vs. CONTRA COSTA COUNTY BUILDING & CONSTRUCTION TRADES COUNCIL,AFL-CIO, a voluntary, unincorporated association; STEAMFITTERS LOCAL UNION NO. 342 of the UNITED ASSOCIATION OF JOURNEY-MEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, Defendants-Appellees.	) No: 92-15497) District Court No:) CV-87-04829

DECLARATION OF SANDRA RAE BENSON
IN SUPPORT OF MOTION
FOR EXTENSION OF TIME
WITHIN WHICH TO FILE A
PETITION FOR REHEARING AND
SUGGESTION OF REHEARING EN BANC

VICTOR J. VAN BOURG
SANDRA RAE BENSON
VAN BOURG, WEINGBERG,
ROGER & ROSENFELD
875 Battery Street, 3rd Floor
San Franciso, CA 94111
Telephone (415) 864-4000
Attorneys for Certain
Defendants-Appellee

Sandra Rae Benson, hereby declares as follows:

1. I am an attorney at law admitted to practice before this Court, and I am one of the attorneys for Defendants-Appellees, Contra Costa Building and Construction Trades Council, Piledrivers, Divers, Carpenters, Bridge, Wharf & Dock Builders Local Union No. 34, Bay Area District Council of Carpenters, Operating Engineers Local No. 3, Iron Workers Local Union No. 378, District Council of Iron Workers of the State of California and Vicinity, District Council of Operative Plasterers and Cement Masons for Northern California, Cement Masons Local Union No 825, Northern California District Council of Laborers and Boilermakers Local Union No. 549.

2. That even though the Defendants-Appellees won this case before this Court, we have some great concerns regarding certain portions of the Court's formulation of the Noerr-Pennington doctrine, which we believe are not consistence with either the Supreme Court or the Ninth Circuit's prior formulations of the Noerr-Pennington doctrine; and regarding certain portions of the Court's formulations regarding the statutory labor exemption to the anti-trust laws.

3. We have not yet decided whether we will file a Request for Rehearing and/or Suggestion of Rehearing En

Banc, and it is necessary for us to have an extension of time to file such Request for Rehearing and Suggestion of Rehearing En Banc so that we will have the time required in order to make that determination in a reasonable and orderly fashion.

4. That I represent ten different clients, as set forth in Paragraph 1 hereinabove. It is necessary for me to contact and consult with each of these ten clients prior to our being able to determine whether we should proceed with filing a Request for Rehearing and Suggestion of Rehearing En Banc. It will take some time for me to do this. Additionally, the officers of some of these organizations are not presently in the State of California, and I have to contact them in various locations.

5. That I have been unable to contact my most of my clients for purposes of consultation thus far, as I have been required to attend all day meetings of the California State Apprenticeship Council on Wednesday July 27, 1994, Thursday July 28, 1994, and today, Friday, July 29, 1994, where I am representing another group of clients. Additionally, I am scheduled to travel to Honolulu, Hawaii on Monday, Tuesday and Wednesday, August 1, 2, and 3, 1994 to attend interviews of other clients with the U.S. Attorney there regarding criminal matters currently pending in the United States District Court in which my clients were the victims of a securities fraud. Therefore, I will not be in my office in the Bay area or available to contact and confer with my clients on these matters until at least Thursday, August 4, 1994.

6. If this Court grants us additional time within which to file a Request for Rehearing and Suggestion of Rehearing En Banc, Mr. Peter Nussbaum, who represents the additional Defendants-Appellees, and I will use the time to coordinate our efforts so that we can file one joint brief in support of that Request instead of filing separate briefs.

7. I am informed and believe that Mr. Peter Nussbaum has contacted Mr. James Gilliland, Jr., the attorney for the Plaintiff-Appellant BE&K herein, and has requested his agreement to this extension of time. Mr. Gilliland stated that he would have to confer with his clients, and that since the request was made after 2 p.m. Pacific Time On July 28, 1994, and his clients are located in the Eastern Time Zone where it was then after 5 p.m., he would have to contact them today, July 29, 1994. Mr. Nussbaum expects to have a response from Mr. Gilliland sometime today.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Franciso, California this 29th day of July, 1994.

/s/
SANDRA RAE BENSON

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BE& K CONSTRUCTION COMPANY, Respondent, and STEAMFITTERS LOCAL 342, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, ET AL, Charging Parties,	32-CA-9474; 32-CA-9475; 32-CA-12531- 1-8

AFFIDAVIT

I, Richard A. Leasia, being duly sworn, hereby state:

1. I am an attorney admitted to practice before this Board and am employed by the law firm of Littler, Medelson, Fastiff & Tichy, a Professional Corporation. I have represented BE&K Construction Corporation, the Respondent in the above referenced matter, since before 1987. I represented both BE&K and USS-Posco, Inc. in connection with the case of USS-Posco, Industries v. Contra Costa County Building & Construction Trades Council, Case No. C-87-4829.

2. I am personally familiar with the motivation of the Respondent in filing and pursuing the district court complaint and subsequent appeal against the Charging Party Unions. I personally participated in each step of the filing, litigation, and appeal process on behalf of BE&K and USS-Posco.

3. The Union conduct which brought about the filing of BE&K's district court complaint and the two amended complaints is set forth at length in the complaints themselves, and more fully in the record of the district court proceedings, and will not be repeated here. Based upon this conduct, and detailed factual evidence in support of the complaint allegations which is part of the record in the district court case, it was BE&K's reasonably held belief that the Unions' conduct was unprotected by Section 7 of the National Labor Relations Act.

4. Most if not all of the Unions' activities had unlawful secondary objectives and were accompanied by acts of violence and threats. The Unions specifically sought to coerce USS-Posco, a neutral employer, to sign pre-hire, hot cargo agreements in violation of Sections 8(e) and 8(b)(4) of the Act, and to remove BE&K from the PITCAL project. USS-Posco is not an employer within the construction industry within the meaning of Sections 8(e) or 8(f).

5. At no time prior to the filing or amendment of BE&K's district court Complaint against the Unions did any of the Charging Parties ever represent employees of BE&K or USS-Posco or enter into a collective bargaining agreement with either Plaintiff. Nor did the Unions ever seek to petition the NLRB for an election by which the Unions could become the representative of BE&K's or USS-Posco's employees.

6. BE&K did not sue any employees in its challenged litigation against the Charging Parties; rather BE&K filed suit only against the Unions.

7. Plaintiffs' goals in filing the above referenced litigation, inter *alia*, were as follows: BE&K and USS-Posco sought to preserve their businesses from what they perceived to be unlawful secondary pressure tactics by the Unions. In particular, they sought relief from secondary threats, restraint and coercion designed to force USS-Posco to violate federal labor laws by ceasing doing business with BE&K, and/or by entering into a pre-hire, hot cargo agreement not sanctioned by Sections 8(e) or 8(f) of the Act. Both Plaintiffs further sought to obtain a court order establishing that union activities of the sort alleged in Respondent's complaint are subject to challenge under federal labor or antitrust laws and are not automatically exempt therefrom. Plaintiffs did not seek to retaliate against any of their employees for engaging in any concerted activity protected by Section 7 of the Act.

8. Respondent was also made aware that in October; 1987, the General Counsel issued a complaint (later settled) against one of the present Charging Party Unions, based upon some of the same conduct which became the subject of Respondent's litigation. See Cement Masons and Plasterers Union Local 825, Case No. 32-CB-2787. The General Counsel then believed that this Union's activity was not protected by Section 7 of the Act.

9. Subsequently, BE&K and USS-Posco made their decision to amend their Complaint in order to seek antitrust relief. They did so only after a searching and intensive review of the law and evidence with leading national experts in the fields of labor and antitrust law. These experts advised BE&K that, though in many respects this was a case of first impression, BE&K had viable claims against the Unions as a matter of law. Upon amending the complaint to state their antitrust theory, Plaintiffs sought treble damages because such damages are automatically awarded to prevailing plaintiffs as a matter of law.

10. Later, during the pendency of Respondent's court action against the Unions, independent authors writing in a leading Law Review reached the conclusion, agreeing with Respondent, that Plaintiffs' claims against the Unions were viable under the antitrust laws. See Durie & Lemley, The Antitrust Liability of Labor Union for Anti-Competitive Litigation, 80 Cal. L. Rev. 757 (1992). This article encouraged us to believe that an appeal to the Ninth Circuit had a reasonable basis and a strong chance of success.

11. Also while Respondent's action was pending, the Division of Advice of the General Counsel of the NLRB recommended issuance of a complaint against a union which had engaged in conduct indistinguishable from that engaged in by the Unions here. See Tame T.I.C., Case No. 27-CB-826, 827 (1993)(Attached hereto as Resp. Ex. 2). The General Counsel specifically concluded that a union's submission of negative environmental comments about a neutral employer to regulatory government agencies, and related actions, violated Section 8 (b) (4) (ii) of the Act.

12. Throughout the district court and appeals court litigation, the Unions filed numerous requests for sanctions against BE&K and USS-Posco, arguing that our litigation should be found to be frivolous or without reasonable basis. I submitted several lengthy sworn declarations to the district court (hereby incorporated by reference) asserting the objectively reasonable basis for each aspect of the Plaintiffs' claims.

13. The district court either ignored or denied each of the Unions' requests for sanctions, with one exception relating to a procedural decision on the Plaintiffs' part to replead certain dismissed allegations in accordance with Ninth Circuit precedent, in order to preserve these issues for later appeal. With that sole exception, the district court found that Plaintiffs' claims were not frivolous and that they were supported by reasonable belief in their merits.

14. Upon further review of the Unions' request for sanctions against the Respondent, the Court of Appeals rejected the Union's demand. In response to the Unions' claim that BE&K's litigation was frivolous/objectively baseless, the Court of Appeals stated: "We obviously disagree." Instead, the Court of Appeals agreed with BE&K's contention that the Unions were not entitled to any attorneys fees as a result of BE&K's litigation against the Charging Parties. USS-Posco, supra, 31 F. 3d at 811. The Court of Appeals also reversed the single instance in which the district court had awarded sanctions to the Union, finding again that the Plaintiffs had acted in good faith. (Id.).

I hereby declare under penalty of perjury under the laws of the State of California that the foregoing declaration consisting of this and _____ other pages are true and correct.

Executed this 18th day of April, 1996, at San Jose, California.

/s/
RICHARD A. LEASIA

DECLARATION OF PETER D. NUSSBAUM

I, Peter D. Nussbaum, declare as follows:

1. I am a member in good standing of the Bar of the State of California.

2. I represent Local 342 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and International Brotherhood of Electrical Workers, Local 302, in cases 32-CA-9474 and 32-CA-9475 respectively.

3. Beginning in 1987, I represented Locals 302 and 342 in litigation that was brought against them by respondent, BE&K, in the United States District Court for the Northern District of California. That litigation finally culminated in a decision by the United States Court of Appeals for the Ninth Circuit, affirming the summary dismissal by the district court of BE&K's three complaints and the award by the district court of costs to the Charging Parties as the prevailing parties in the litigation. USS-POSCO Industries v. Contra Costa Bldg. & Constr. Trades Council, 31 F.3d 800 (9th Cir. 1994) ("POSCO"). BE&K did not seek rehearing or rehearing en banc of the Ninth Circuit's decision, nor did it seek certiorari in the United States Supreme Court.

4. On October 16, 1987, shortly after BE&K filed its initial complaint in the POSCO litigation, counsel for the other Charging Parties in this case wrote to BE&K's attorney, Richard Leasia, requesting that he dismiss the complaint because it was baseless and was filed simply to harass the Charging Parties. The letter was also pointed out to Mr. Leasia that many of the actions by the Charging Parties that were challenged in the lawsuit were protected by the First Amendment and were immune from liability

pursuant to the Noerr-Pennington doctrine. A true and correct copy of a letter of October 16, 1987 from Victor J. Van Bourg to Richard Leasia, is attached hereto as Exhibit 2.

5. At approximately the same time, I called Mr. Leasia on behalf of the Charging Parties that I represented. I reiterated to him that the Noerr-Pennington doctrine immunized much of the alleged conduct challenged in his complaint. While Mr. Leasia acknowledged that he knew of no cases that supported the theory of his complaint, he refused to dismiss it. When I asked him why, he stated that the unions had come up with certain "new tactics" that had been directed against his clients and that he had been told by those clients "to find a way to stop that conduct." He also conceded that the theory of his complaint was "novel."

I also asked Mr. Leasia to explain why Locals 302 and 342 were included in BE&K's third claim for relief, which was based on certain litigation (the so-called "Piledrivers" case) in which those locals had not participated. Mr. Leasia acknowledged that he had no evidence linking either Local 302 or Local 342 to the Piledrivers case, but said that he hoped to adduce such evidence through discovery. He then rejected my request that those locals at least be dismissed from the Piledrivers claim for relief until such time as BE&K had evidence linking them to that case. Mr. Leasia did, however, promise to dismiss the locals at a subsequent time if his discovery did not disclose such evidence.

My conversation with Mr. Leasia is recounted in a declaration I filed in the POSCO litigation on March 10, 1988. A true and correct copy of that declaration is attached hereto as Exhibit 3.

6. Despite Mr. Leasia's promise, he did not dismiss Locals 302 and 342 from the Piledrivers claim for relief even after the extensive discovery he undertook produced no evidence that they had any tie to that case. The district court eventually dismissed the Piledrivers claim as to

Locals 302 and 342 on the ground that they had no relationship to that litigation.

7. While Mr. Leasia was initially lead counsel for BE&K, he did not have that role when respondent filed its second amended complaint. From that time on, I dealt only with attorneys from another law firm, and I do not recall Mr. Leasia being present or arguing to the court during any of the numerous hearings that occurred after the filing of the second amended complaint.

8. During the court of the POSCO litigation, the law firm of Gibson, Dunn & Crutcher attempted to file two amicus briefs on behalf of BE&K. The district court allowed it to file one such brief, but denied its request to file the other. A true and correct copy of the amicus brief filed by Gibson, Dunn & Crutcher is attached hereto as Exhibit 4.

9. BE&K's brief relies heavily on a student comment that appeared in the May 1992 issue of the California Law Review. The authors thank a "Steve McCracken, who provided us with access to his files." 80 Cal.L.Rev.. at 757. Mr. McCracken was a partner in Gibson, Dunn & Crutcher specializing in antitrust law. Attached hereto as Exhibit 5 is a true and correct copy of a page from the 1992 edition of the Martindale-Hubbell Law Directory listing Mr. McCracken.

10. In its brief to the Ninth Circuit, BE&K argued that "the unions had filed twenty-nine separate lawsuits." A true and correct copy of pages 2, 4, 6 and 37 of BE&K's opening brief in the Ninth Circuit is attached hereto as Exhibit 6.

11. I also represented certain respondents in Tame T.I.C., Case No. 24-CB-826, 837 (1993). In that case Advice issued a memorandum authorizing the issuance of a complaint. In fact, the case ultimately settled. Moreover,

counsel for respondents was told by Yvonne Dixon, of the General Counsel's Office, that, although advice recognized that the respondent's position might be correct, it had authorized a complaint because it believed that the case rased important issues that should be presented to the Board for resolution.

I declare under penalty of perjury that the foregoing is true and correct of my own personal knowledge, and that if called to testify in this matter I would do so as set forth above.

Executed this 17th day of May, 1996, at San Francisco, California.

/s/

Peter. D. Nussbaum

EXHIBIT 2

October 16, 1987

Richard Leasia
David Murphy
Dennis Brown
LITTLER, MENDELSON, FASTIFF
& TICHY
Sixty South Market Street
Suite 1100
San Jose, California 95113-2303

RE: USS-POSCO Industries and BE&K Construction Company v. Contra Costa County Building and Construction Trades Council, AFL-CIO, et al U.S.D.C. No: C87-4829 SAW

Gentlemen:

This letter is being written on behalf of our client Pile Drivers, Divers, Carpenters, Bridge, Whart & Dock Builders, Local 34 in response to the "courtesy copy" of the above-entitled lawsuit which you sent to our office.

Please be advised that this firm is not authorized to accept service on behalf of the Defendant and this letter does not constitute an appearance on behalf of the Defendant. This letter does, however, constitute a notification to you pursuant to Federal Rule of Çivil Procedure 11 that if you do not voluntarily dismiss the above-entitled lawsuit, and if our client is required to respond to this lawsuit, we will vigorously seek sanctions against the Plaintiffs and against

your personally pursuant to Federal Rule of Civil Procedure 11 for filing a frivolous action.

There are numerous legal and factual defects contained in your Complaint, however, we will list only a few to establish the grounds for this Rule 11 notice.

With respect to your first cause of action alleging "unlawful activities" on the basis of certain of the Defendants having urged adoption by the Contra Costa County Board of Supervisors of a toxic waste ordinance, those actions, as you are well aware, are protected by the First Amendment and the Noerr-Pennington doctrine which affords immunity to efforts by groups or individuals when lobbying political bodies because "[t]he right of petition is one of the freedoms protected by the Bill of Rights." (Eastern R. Conferences v. Noerr Motors , 365 U.S. 127, 138 (1961).

With respect to your second cause of action dealing with certain Union employees ceasing work because of hazardous working conditions, your clients are well aware of the fact that the State Department of Health in fact found that the dirt on the site was contaminated with lead and, in addition, your client's filed 8(b)(4) charges with the National Labor Relations Board concerning these incidents. You will recall that we submitted evidence to the Board and, after considering the evidence which we submitted, your clients voluntarily withdrew their charges which would have been dismissed had they not done so.

With respect to your third cause of action alleging "unlawful activities" because certain of the Defendants filed the lawsuit entitled Piledrivers, Divers, Bridge Wharf & Dock Builders Union Local 34, AFL-CIO, et al v. USS-POSCO Industries, Inc., et al., Case Number 299932, those actions are likewise protected by the Noerr-Pennington doctrine which immunity includes instituting litigation in the courts. (California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 509 (1971).

With respect to your fourth cause of action which alleges "unlawful activity" because certain of the Defendants filed grievances before NMAPC, you and your clients are ell aware that the proprietary of the Unions having filed those grievances and a requested stay of the arbitration was litigated in the United States District Court in the Western District of Pennsylvania which stay was denied by the Honorable Judge Maurice B. Cohill, Jr. Additionally, you are well aware that the arbitration panel sustained the Union's grievances.

Finally, you are well aware that litigation is currently proceeding concerning these matters in other forums including the United States District Court in the Western District of Pennsylvania.

It is our firm belief that this instant litigation is frivolous and designed solely to harass the Unions because you and your clients have been unsuccessful in other harassing litigation which you have instituted in the State Court.

Based upon the foregoing, we are placing you on notice that unless this litigation is dismissed, our clients will vigorously seek Rule 11 sanctions against your clients and against you personally.

Sincerely,

/s/

VICTOR J. VAN BOURG

VVB/CEF

EXHIBIT 3

PETER D. NUSSBAUM
VICTORIA CHIN
NEYHART, ANDERSON, NUSSBAUM,
REILLY & FREITAS
568 Howard Street
P.O. Box 7426
San Francisco, CA 94120
(415) 495-4949

Attorneys for the Defendants
IBEW, Local 302 and
Steamfitters, Local 342

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

USS-POSCO INDUSTRIES, et al., Plaintiffs,	) CASE NO. C-87-4829 SAW
vs.	) DECLARATION OF PETER D.
CONTRA COSTA COUNTY BUILDING CONSTRUCTION TRADES COUNCIL AFL-CIO, et al., Defendants.	) NUSSBAUM IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL DISMISSAL AND/OR SUMMARY JUDGMENT

I, PETER NUSSBAUM, declare:

1. I am a member of the State Bar of California and am admitted to practice before the United States District Court for the Northern District of California.

2. After reviewing the complaint in this action I called Richard Leasia, plaintiffs' counsel. I called because it did not appear, based upon my preliminary research, that the first, third and fourth claims stated claims upon which relief could be granted. Also, I wanted to confirm that my clients were not included in the second, third and fourth claims because those claims did not appear to allege any conduct on their part.

I expressed my views to Mr. Leasia and requested that he dismiss the action as to my clients. He refused to do so although he acknowledged that he knew of no cases which directly supported the first claim. When I asked why he would not dismiss that claim in view of Noerr-Pennington, he stated that the union defendants had come up with certain new tactics that had been directed at his clients and that hie clients had instructed him to find a way to stop that conduct. He conceded that the first claim was somewhat novel.

With regard to the third claim I asked how my clients were covered since neither they nor the Building Trades was a named plaintiff. He admitted that he had no evidence that directly tied my clients to the lawsuit but stated a belief by his clients that all of the union defendants were tied to all of the various conduct. He stated that he hoped through discovery to obtain evidence to support that theory.

I suggested to Mr. Leasia that the proper way to proceed was to dismiss my clients from the third claim and, if he later obtained evidence through discovery which implicated them, to amend the complaint. I also mentioned that by including my clients in the third claim without any evidence that they were involved in the lawsuit, he had

violated Rule 11 and that I would see sanctions against him and his clients if he did not dismiss that claim as to Locals 302 and 342. (I also stated that I would seek sanctions with regard to the other claims if they were not dismissed as well.)

At no time did I ask Mr. Leasia not to conduct discovery until the Court ruled on a Rule 12 motion. In fact, I expected him to begin discovery and, for that reason, filed a motion for a protective order staying discovery until my motion for summary judgment was ruled upon. Such a motion would not have been necessary if I had already discussed a stay of discovery with Mr. Leasia.

3. In reviewing Mr. Leasia's brief I noted the following statement on pages 23-24.

> In fact, in the interests of economy, Defendants' counsel expressly asked Plaintiffs not to conduct discovery until the Court could rule on an anticipated Rule 12 motion. (Emphasis in original.)

I assumed when I first read that sentence that he was referring to counsel for one of the other defendants but, upon reviewing his declaration, realized he was referring to me even though the declaration (¶2) does not claim that I asked him to delay discovery.

4. On March 1, 1988 I called Mr. Leasia and told him that he had incorrectly stated that I had requested a delay of discovery. At first he claimed that his brief made no such statement. When I pointed out the above sentence to him he said that he had "interpreted" my comments about the cost of discovery as a request to postpone it. I pointed out that his brief said that I "expressly" asked that discovery not be conducted. He conceded that that statement was not accurate and said he would so inform the court at oral argument if I so wished. I asked him to please correct it in writing before the

hearing of the other defendants and suggested that I file a counter-declaration. I told him that I thought he should correct the error since he created it but, if he would not, I would have no choice but to file a declaration.

I declare under penalty of perjury that the above is true and correct of my own personal knowledge and that, if called upon to testify, I would do so as set forth above.

Executed this 9th day of March 1988 at San Francisco, California.

/s/ _____

PETER D. NUSSBAUM

Supreme Court, U.S.
FILED
FEB 19 2002
CLERK

No. 01-518

IN THE
SUPREME COURT OF THE UNITED STATES

BE&K CONSTRUCTION CO.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, et al.

Respondents.

On Writ of Certiorari To The United States Court of Appeals
For The Sixth Circuit

BRIEF FOR PETITIONER

Maurice Baskin
Counsel of Record for
Petitioner
Karen L. Vossler
Venable, LLP
1201 New York Ave., N.W.,
Suite 1000
Washington, D.C. 20005
202-962-4800

February 19, 2002

QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals for the Sixth Circuit err in holding that under *Bill Johnson's Restaurants Inc. v. NLRB*, 461 U.S. 731, 113 LRRM 2647 (1983), the NLRB may impose liability on an employer for filing a losing retaliatory lawsuit, even if the employer could show the suit was not objectively baseless under *Professional Real Estate Investors Inc. v. Columbia Picture Industries Inc.*, 508 U.S. 49 [61 USLW 4450] (1993).

LIST OF INTERESTED PARTIES

The following is a complete list of all parties with an interest in the outcome of this litigation. There are no other parties or subsidiary companies that are required to be listed pursuant to Supreme Court Rule 29.6:

Petitioner herein:

BE&K Construction Company. ("BE&K").

Respondents herein:

National Labor Relations Board ("NLRB")

Steamfitters Local 342, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO and Local 302, International Brotherhood of Electrical Workers, AFL-CIO and District Council of Iron Workers of the State of California and Vicinity, International Union of Bridge, Structural and Ornamental Iron Workers, AFL-CIO and Contra Costa County Building And Construction Trades Council, AFL-CIO and Northern California District Council Of Laborers, Laborers International Union Of North America, AFL-CIO and Bay Counties District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO and Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL-CIO and Local Union No. 378, International Union of Bridge, Structural and Ornamental Iron Workers, AFL-CIO and Cement Masons Union Local No. 825, Operative Plasterers and Cement

Masons International Association, AFL-CIO and Local No. 549, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO.

(hereinafter the "Respondent Unions" or the "Unions")

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW.....i
LIST OF INTERESTED PARTIES.....ii
TABLE OF AUTHORITIES.....v
OPINIONS BELOW.....1
JURISDICTION.....1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE.....1
STATEMENT OF THE CASE.....2
SUMMARY OF ARGUMENT.....12
ARGUMENT.....14

I. The Sixth Circuit's Order Creates An Unwarranted Bifurcated First Amendment Standard Contrary To Holdings Of This Court.....14

II. The Erroneous Bifurcated Standard Created By The NLRB And The Sixth Circuit Operates To Chill Employers' First Amendment Rights And Its Unique Application To The NLRA Is Unjustified.....26

III. BE&K's Suit Was Unquestionably Filed With "Probable Cause" And Was Not "Objectively Baseless".....29

CONCLUSION.....35

TABLE OF AUTHORITIES

CASES

BE&K Construction Co. v. NLRB, 246 F. 3d 619 (6th Cir. 2001).....*passim*
BE&K Construction Co., 329 NLRB No. 68 (Sept. 30, 1999).....*passim*
Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983).....*passim*
Braum Elec. Co., Inc., 324 NLRB 1 (1997).....21
Brownsville Golden Age Nursing Home v. Wells, 839 F. 2d 155 (3d Cir. 1988).....18
Bruce v. City of Gainesville, 177 F.3d 949 (11th Cir. 1999).....21
California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).....8,12,15,17,25,33
Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).....19
Clyde Talyor Co., 127 NLRB 103 (1960).....27
Coon v. Grenier, 867 F.2d 73 (1st Cir. 1989).....20
Diamond Walnut Growers, Inc. v. NLRB, 53 F. 3d 1085 (9th Cir. 1995).....22,24
Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).....15
Eaton v. Newport Board of Educ., 975 F. 2d 292 (6th Cir. 1992).....18
Evers v. County of Cluster, 745 F. 2d 1196 (9th Cir. 1984).18
Gen Probe, Inc. v. Amoco Corp., Inc., 926 F. Supp. 948 (S.D. Cal. 1996).....18
Herr v. Pequea Township, 274 F. 3d 109 (3d Cir. 2001).....18
INVST Fin. Group, Inc. v. Chem-Nuclear Systems, Inc., 815 F.2d 391 (6th Cir. 1987).....28
Jones v. United States, 613 F. Supp. 1311(5th Cir. 1980).....19
Keegel v. Key West & Caribbean Trading Co., Inc., 627 F.2d 372 (D.C. Cir. 1980).....20
McDonald v. Smith, 472 U.S. 479 (1985).....14
McEnany v. West Delaware County Comm. Sch. Dist.,

844 F. Supp. 523 (N.D. Iowa 1994) 29
NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)..18
NLRB v. Vanguard Tours, Inc., 981 F. 2d 62 (2d Cir. 1992) 21,34
Otter Tail Power Co. v. United States, 410 U.S. 366 (1973)..... 32
Petition of General Motors Corp., 182 N.E.2d 815 (Mass. 1962)..... 30
Petrochem Insulation, Inc., 330 NLRB No. 10 (1999)..... 21
Petrochem Insulation, Inc. v. NLRB, 240 F. 3d 26 (D.C. Cir. 2001)..... 24
Power Systems, 229 NLRB 445 (1978), enf. den., 601 F. 2d 936 (7th Cir. 1979)..... 28
Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49 (1993)..... *passim*
Southern Steamship Co. v. NLRB, 316 U.S. 31 (1942)..... 28
Summit Valley Industries, Inc. v. United Brotherhood of Carpenters & Joiners, 456 U.S. 717 (1982) 28
Tame T.I.C., Case No. 27-CB-826, 827 (1993) 14,34
Thompson v. American Home Assur. Co., 95 F.3d 429 (6th Cir. 1996) 20
United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217(1967) 15
United Mine Workers v. Pennington, 381 U.S. 657 (1965)..... 14
USS-Posco Indus. v. Contra Costa County Bldg. & Const. Trades Council, AFL-CIO, 31 F. 3d 800 (9th Cir. 1994).... 1
USS-POSCO, 692 F. Supp. 1166 (N.D. Cal. 1988) 4
USS-POSCO, 721 F. Supp. 239 (N.D. Cal. 1988) 5
USS-POSCO, 134 LRRM 2590 (N.D. Cal. 1990) 6
USS-POSCO, No. C87-4829 DLJ (Feb. 11, 1992)(final judgment)..... 6
Vendo Co. v. Lekto-Veńd Corp., 433 U.S. 623 (1977)..... 19
Video Int. Prod., Inc. v. Warner-Amex Cable Communications, Inc., 858 F. 2d 1075 (5th Cir. 1988)....18
We, Inc. v. City of Philadelphia, 174 F. 3d 322 (3d Cir. 1999)..... 18

White v. Lee, 227 F. 3d 1214 (9th Cir. 2000)..... 22,23,24

STATUTES

15 U.S.C. 1, 2 5,14
15 U.S.C. 15, 26..... 5
28 U.S.C. 1254(1)..... 1
29 U.S.C. 157..... 9
29 U.S.C. 158(a)(1)..... 8,16
29 U.S.C. 187..... 4

OTHER

Daralyn J. Durie & Mark A. Lemley, *The Antitrust Liability of Labor Unions for Anti-Competitive Litigation*, 80 Cal. L. Rev. 757, 764-800 (1992)..... 5,34
Herbert R. Northrup, *Corporate Campaigns: A Perversion of the Regulatory Process*, 17 J. Lab. Res. 345 (1996)..... 2

OPINIONS BELOW

The ruling of the United States Court of Appeals for the Sixth Circuit as to which the writ has been granted is reported as *BE&K Construction Co. v. NLRB*, 246 F. 3d 619 (6th Cir. 2001), rehearing en banc den. (June 28, 2001) (J.A. 1a). That decision enforced an Order of the National Labor Relations Board reported as *BE&K Construction Co.*, 329 NLRB No. 68 (Sept. 30, 1999) (J.A. 28a). A related decision of the Court of Appeals for the Ninth Circuit is reported as *USS-POSCO Indus. v. Contra Costa County Bldg. & Const. Trades Council, AFL-CIO*, 31 F. 3d 800 (9th Cir. 1994)(the "USS-POSCO" action)(J.A. 62).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Rehearing en banc was denied by the court of appeals on June 28, 2001 (J.A. 26a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

United States Constitution, First Amendment

15 U.S.C. § 1, et seq

29 U.S.C. § 157

29 U.S.C. § 158(a)(1)

29 U.S.C. § 158(b)(4)

29 U.S.C. § 160 (c)

29 U.S.C. §187.

STATEMENT OF THE CASE

This Petition arises from the Sixth Circuit's denial of Petitioner's appeal from an Order of the NLRB. The NLRB action, in turn, arose from litigation commenced by BE&K and USS-POSCO Industries ("UPI") in response to a protracted corporate campaign[1] of litigation and other secondary pressure tactics waged by the Respondent Unions against the Petitioner during the late 1980s. *USS-POSCO, supra, 31 F. 3d 800.*

A. The UPI Contract And The Unions' Corporate Campaign.

In the late 1980's USX Corporation and Pohang Iron and Steel Co. of South Korea formed UPI as a joint venture to modernize and operate an aging steel mill in Pittsburg, California (the "PITCAL" mill). UPI awarded a construction contract to BE&K, a construction company whose employees had chosen to remain non-union.

After the award, the Unions, who did not represent any of BE&K's employees, announced a goal of making an example of PITCAL and eliminating non-union construction in Northern

[1] As used here, the term "corporate campaign" refers to an effort by a labor union to apply pressure tactics against competition from non-union employers outside the representational procedures governed by the NLRA. *See* Herbert R. Northrup, *Corporate Campaigns: A Perversion of the Regulatory Process*, 17 J. Lab. Res. 345 (1996). Such campaigns typically do not rely on the support of the employees of the affected employer, and may include violence, regulatory permit challenges, litigation and other forms of pressure tactics outside the coverage of the NLRA.

California. The Unions thereafter fought UPI, BE&K and BE&K's joint venture partner Eichleay Constructors ("Eichleay") at every turn. As summarized by the Sixth Circuit (J.A. 4a), the Unions:

> [A]dvocated the adoption and enforcement of a toxic waste emission standard for the construction project, even though the labor groups had no genuine concern that the modernization of the steel mill would be environmentally harmful; picketed and hand-billed at BE&K's premises without disclosing the nature of their disagreement with the company and encouraged employees of subcontractors to engage in a strike at the project; filed a civil action in California state court, *Piledrivers, Divers, Bridge Wharf & Dock Builders Union Local 34, AFL-CIO, et al. v. USSPOSCO Indus., Inc., et al.*, alleging among other things, violations of California's Health and Safety Code in an effort to delay the modernization project and increase costs; and initiated contract grievances against Eichleay ... under collective bargaining agreements that did not apply to Eichleay.

It is undisputed that 14 of the Unions' 29 separate lawsuits and arbitration proceedings failed to achieve any positive relief whatsoever. *USS-POSCO*, 31 F.3d at 811 & 811 n.9 (J.A. 78). In October 1987, the NLRB's General Counsel brought a complaint against one of the unions, later settled, asserting that

at least one aspect of the campaign against BE&K constituted an unfair labor practice. 4/18/96 Richard Leasia Aff. at 3, ¶ 8; (J.A. 89).

B. The USS-POSCO Action.

In September 1987, BE&K and UPI brought suit against the Unions, pleading that the Unions' actions violated Section 303 of the Labor Management Relations Act, 29 U.S.C. § 187, by engaging in: (1) wrongful political and lobbying activities, including advocacy of a toxic waste ordinance without any genuine belief that the project would harm the environment; (2) illegal picketing and handbilling at the site, fomenting violence, and inciting subcontractor employees to engage in a strike; (3) filing the *Piledrivers* suit and other litigation in bad faith ; and (4) wrongfully bringing collective bargaining grievance and arbitration actions against Eichleay(J.A. 5a).

The unions eventually moved to dismiss or for partial summary judgment on the Section 303 claims, claiming that their lobbying efforts, the *Piledrivers* suit, and the *Eichleay* actions were protected First Amendment activities under the *Noerr-Pennington* doctrine. *See USS-POSCO*, 692 F. Supp. 1166, 1168-69 (N.D. Cal. 1988); 7/29/88 Memorandum and Order, (J.A.16); *USS-POSCO*, 31 F.3d at 804 (J.A. 63-64). The district court agreed in part, concluding that certain of these union activities were constitutionally protected attempts to petition the government and did not fall under the sham exception to *Noerr-Pennington*. 7/29/98 Memorandum and Order (J. A. 19-21).

BE&K and UPI amended their complaint in October 1988, asserting that the unions' campaign violated Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. § 1, 2. Plaintiffs subsequently amended their complaint in May 1989 to assert violations of the Clayton Act, 15 U.S.C. § 15, 26. Prior to making these claims, BE&K and UPI consulted national antitrust and labor law experts, who advised them that, while a matter of first impression, BE&K and UPI had viable claims as a matter of law. 4/18/96 Leasia Affidavit at ¶ 9, (J.A. 87). Independent legal scholars, who wrote in a leading law review that the plaintiffs could assert antitrust claims against the unions, subsequently buttressed BE&K's and UPI's contentions. *Id.* at ¶ 10, (J.A. 88), Daralyn J. Durie & Mark A. Lemley, *The Antitrust Liability of Labor Unions for Anti-Competitive Litigation*, 80 Cal. L. Rev. 757, 764-800 (1992).

Nevertheless, the district court applied *Noerr-Pennington* to bar BE&K's new antitrust allegations against the Unions to the extent that the allegations addressed conduct previously dismissed by the court. The court also dismissed certain related Section 303 claims. *USS-POSCO*, 721 F. Supp. 239, 241-42 (N.D. Cal. 1988); 5/1/89 Order, (J.A. 25-26)[2] UPI

---

2 The district court entered Rule 11 sanctions against BE&K, solely for repleading previously dismissed claims. 10/2/89 Order Awarding Attorney's Fees, (J.A. 38). This order was later reversed on appeal. *USS-POSCO*, 31 F.3d at 812 (J.A. 79-80). The unions filed numerous other motions for sanctions in the district court arguing that BE&K's claims lacked a reasonable basis. 4/18/96 Leasia Aff. at ¶¶ 12-13, (J.A. 88). All of those substantive motions were denied by the district court. *Id.*

voluntarily dismissed its own claims in March 1990. (3/27/90 Ex Parte Motion for Voluntary Dismissal).

Some antitrust claims still remained for resolution. In June 1990, the district court limited discovery with respect to these claims. The court permitted BE&K to inquire only into whether the unions had conspired with BE&K's competitors. *USS-POSCO*, 134 LRRM 2590, 2594 (N.D. Cal. 1990) (June 8, 1990 Order) (J.A 52-53). Following discovery, the unions moved for summary judgment, which BE&K did not oppose in view of the court's previous rulings. 9/5/91 Order at 2, (J.A. 57). By stipulation, BE&K voluntarily dismissed two remaining claims (*e.g.*, the allegation of instigating violence) under Section 303 of the LMRA, and the court entered final judgment in favor of the unions in February 1992. (J.A. 58). The court awarded fees and costs as the sanction for repleading prior claims. BE&K appealed the antitrust and sanctions decisions to the Ninth Circuit.

C. The Ninth Circuit Decision

While ultimately affirming the district court's judgment against BE&K, The Ninth Circuit's decision reversed the district court's legal analysis and agreed with many of BE&K's contentions. *See USS-POSCO*, 31 F.3d at 810 (J.A. 75-77). In particular, the Ninth Circuit concluded that, but for the fact that the Unions had been successful on a slight majority of their claims, much of the Union activity alleged in BE&K's complaints would not have been protected from the antitrust laws. *Id.*

The Ninth Circuit ruled for BE&K in rejecting the district court's conjunctive test requiring proof of

both an illegal conspiracy with non-labor groups and an illegitimate purpose in the combination. *Id.* at 809-10. The Court of Appeals therefore held that the district court had erred in denying BE&K discovery as to the second prong, illegitimate purpose. *Id.* at 810. The Ninth Circuit ultimately affirmed the district court's judgment because it found the error harmless in light of the Unions' *Noerr-Pennington* defense. *Id.* at 810-11, 812 (J.A. 75-80).[3]

The Ninth Circuit held that the Unions' partial success rate in just over half (15 of 29) of their lawsuits – "a batting average exceeding .500" as the court described the record – "forecloses any possibility that BE&K could substantiate its claim." *Id.* The court reasoned that "[t]he fact that more than half of all the actions as to which we know the results turn out to have merit cannot be reconciled with the charge that the unions were filing lawsuits and other actions willy-nilly without regard to success." *Id.* The court therefore affirmed the grant of summary judgment on the antitrust counterclaim.

The Ninth Circuit nonetheless ruled in BE&K's favor with respect to overturning the district court's sanction of fees for the entire district court litigation. The Ninth Circuit further rejected the Unions' request for sanctions arising out of BE&K's appeal. In reviewing BE&K's allegations, the Court of Appeals confirmed that they were reasonable under

---

[3] An irony of this case is that the Unions defended their actions in the Ninth Circuit by relying on the "objectively baseless" standard of *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, 508 U.S. 49 (1993).* Now that BE&K's litigation is challenged, the unions claim that *Professional Real Estate* does not apply, as is further explained below.

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), "and, if proven, would be sufficient to overcome the unions' *Noerr-Pennington* defense." *Id.* at 811 (J.A. 78-79).[4]

After the Ninth Circuit decision issued, counsel for the ***Unions*** issued a sworn declaration expressing "great concerns" over the outcome. Benson Decl. at ¶ 2 (J.A. 82).

D. The NLRB Proceedings.

One year after the Ninth Circuit decision, on October 18, 1995, the General Counsel of the NLRB filed a complaint against BE&K, claiming that BE&K had violated Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), by bringing and prosecuting the *USS-POSCO* action against the Unions. The General Counsel further sought an order that BE&K reimburse the Unions for the attorneys' fees and costs they had incurred in defending against BE&K's suit. The Unions intervened on the side of the General Counsel. Both sides filed cross-motions for summary judgment with the NLRB.

In support of its motion for summary judgment, BE&K presented undisputed evidence of the objective basis of its actions. BE&K's counsel

---

[4] The Unions' argument for sanctions was based on the notion that *California Motor Transport*, the primary authority underlying BE&K's original claims, had been overruled by *Professional Real Estate Investors*. The Ninth Circuit squarely rejected that argument, holding instead that *California Transport* was reaffirmed by *Professional Real Estate*. The Court of Appeals therefore refused to sanction BE&K, stating pointedly with regard to the unions' arguments, "We obviously disagree." *USS-POSCO*, 31 F.3d at 811 n.10 (J.A. 79).

confirmed by affidavit that the Company had acted upon legal advice that its claims were reasonable as well as advice that it had a significant chance of prevailing in the *USS-POSCO* action, especially in the Ninth Circuit, where counsel believed that BE&K had "a strong chance of success." 4/18/96 Richard Leasia Affidavit at ¶ 10 (J.A. 88).

Counsel further explained that during the course of the proceedings, the Division of Advice of the General Counsel of the NLRB had recommended that a complaint be issued against a union that had engaged in conduct which, in counsel's view, was indistinguishable from the campaign at issue in the *USS-POSCO* action. *See id.* at ¶11, (J.A. 88).

BE&K's counsel's affidavit also explained the context of the dispute, noting that the unions had no representational status and that "[m]ost if not all" of the union activities had unlawful secondary objectives and had been accompanied "by acts of violence and threats." 4/18/96 Richard Leasia Affidavit at ¶ 4 (J.A. 86). For that and other reasons, BE&K's counsel's affidavit in support of BE&K's motion for summary judgment affirmed that the company had a "reasonably held belief" that the unions' conduct was unprotected by Section 7 of the NLRA, and he expressly denied any retaliatory motives. *Id.*, ¶ 3, (J.A. 86).

More than three years later, on September 30, 1999, a three-member panel of the NLRB issued a decision and order in favor of the General Counsel. 329 NLRB No. 68 ((J.A. 28a). Purporting to apply the Supreme Court's test in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 749 (1983) that "it is an unfair labor practice to prosecute an

unmeritorious lawsuit for a retaliatory purpose," the Board interpreted the Supreme Court's use of the term "meritorious" to require only a determination of whether BE&K had prevailed in the underlying litigation. *Id.* at 6 (J.A. 44a-45a). Because the unions had successfully defeated BE&K's Section 303 and antitrust claims by obtaining summary judgment, the Board concluded that those claims "were unmeritorious within the meaning *of Bill Johnson's*." *Id.* at 6, (J.A. 46a-47a). As for the claims that BE&K had voluntarily dismissed (the allegations of violence, work stoppages, and unlawful picketing at the site), the NLRB held that "the withdrawal of a claim could be regarded as equivalent to an [sic] showing that it lacks merit," again relying upon *Bill Johnson's*. *Id.* at 7, (J.A. 49a) (quoting 461 U.S. at 747). The Board expressly refused to consider any of BE&K's proffered evidence of good faith and reasonable basis for bringing and prosecuting the litigation. (J.A. 60a).

After finding that BE&K had violated § 8(a)(1) of the NLRA by suing the Unions, the NLRB ordered BE&K to pay an award of all legal fees and expenses incurred by the unions in defending against the *USS-POSCO* action. *Id.* at 11-12, (J.A. 65a).[5]

F. The Sixth Circuit's Decision

On April 9, 2001, the U.S. Court of Appeals for the Sixth Circuit affirmed the Board's decision. *See BE&K Construction Co. v. NLRB*, 246 F. 2d 619 (6th Cir. 2001) (J.A. 1a). The court held that dicta in

[5] In addition, though it was undisputed that BE&K committed no unfair labor practices against its own employees, the Board ordered that the Company mail compliance notices to its employees and even former employees on the project. *Id.*

this Court's decision in *Bill Johnson's*, *supra*, justified the NLRB's application of a bifurcated First Amendment standard for protecting the right of access to the courts under the National Labor Relations Act, a standard that differs from the standard set forth by this Court more recently in *Professional Real Estate*, *supra*.

The court of appeals stated that "[t]he mere failure of the company to prevail on its claims against the union in regular judicial proceedings was sufficient to strip BE&K of some of its First Amendment protection because of the company's prior opportunity to avail itself of a judicial forum for redress of its grievances." *Id.* at 628-29 (J.A. 18a).

The court of appeals specifically rejected application of this Court's decision in *Professional Real Estate*. Instead, the Sixth Circuit articulated the following bifurcated analysis to determine the First Amendment protections to be afforded an employer for filing a retaliatory lawsuit against employees and/or unions:

> Prior to a court ruling on the merits of the employer's suit, the Board will not find an unfair labor practice unless the underlying lawsuit was without reasonable basis. Following a court determination that the employer's claims are without merit, however, there is no longer a need to prevent interference with the First Amendment right to seek judicial redress. At that point, the Board is justified in examining the motives of the employer to determine whether the company unfairly dragged the workers or their representatives into court to further illegal objectives.

Id. at 629 (J.A. 19a). This Court granted BE&K's Petition for Writ of Certiorari challenging the Sixth Circuit's holding, on January 4, 2002.

SUMMARY OF ARGUMENT

The First Amendment protects the right to seek redress in the courts under the petition clause. From *Noerr-Pennington* to *Professional Real Estate*, this Court has consistently held that petitioning is protected where the petition is not "objectively baseless." This Court has applied the "objectively baseless" standard not only under the antitrust laws, but also in many other contexts, including under the NLRA with respect to pending litigation.

In the present case, the NLRB and the Sixth Circuit have articulated an unwarranted "completed case" labor law exception to this Court's consistent application of the *Noerr-Pennington* doctrine. The consistency of this Court's decisions both before and after *Bill Johnson's*, however, belies the claim that the Court intended in *Bill Johnson's* to create two separate Constitutional standards – one standard for the period before a court has reached a final decision on the merits of the employer's underlying case and another standard once the case has been decided.

This Court's holding in *Professional Real Estate* should have clarified any misunderstanding that might have arisen out of the *Bill Johnson's* opinion. No exception to the consistent decisional standard first announced in *Noerr-Pennington* is now justified.

The bifurcated standard adopted by the NLRB and enforced by the Sixth Circuit is both unfair and untenable as a guideline for behavior. The new bifurcated standard plainly chills employers' rights to petition the courts, since it is impossible for employers to know in advance how litigation will be resolved, and therefore, impossible to avoid committing an unfair labor practice except by not going to court in the first instance. There is no principled basis for applying a different First Amendment standard to completed litigation under the NLRA than this Court has already declared should apply to ongoing litigation under that statute. A uniform standard is particularly compelled where the lawsuit at issue is filed pursuant to a federal statute having equal standing with the NLRA, such as the antitrust laws or the Labor Management Relations Act.

In the present case, BE&K's suit was unquestionably filed with "probable cause," and was not "objectively baseless." As a result, the Court should reverse the court of appeals and should deny enforcement of the NLRB's Order against BE&K.

ARGUMENT

I. The NLRB's Order Creates An Unwarranted Bifurcated First Amendment Standard Contrary To Holdings Of This Court.

This case is the culmination of a series of NLRB and court decisions that have created a dangerous anomaly in the law threatening the entire business community's right of access to the courts on labor issues. By upholding the NLRB's unfair labor practice finding against BE&K and the award of attorneys fees to the Unions, the Sixth Circuit has grossly distorted the holding of *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983). As a result, the court of appeals has undercut vital First Amendment protections which this Court has found to be paramount in *Professional Real Estate Investors v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), and related cases.

This Court has described the right to petition as "among the most precious of the liberties safeguarded by the Bill of Rights" and "intimately connected, both in origin and in purpose, with the other First Amendment rights of free speech and free press." *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967). "[E]xcept in the most extreme circumstances citizens cannot be punished for exercising this right 'without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions...'" *McDonald v. Smith*, 472 U.S. 479, 486 (1985) (Brennan, J., concurring).

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), this Court first recognized that those who exercise their First Amendment right to petition the government for redress deserve immunity from statutory liability. In *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), this Court affirmed the doctrine of immunity previously expressed in *Noerr*. Both *Noerr* and *Pennington* arose in the context of the Sherman Act. The *Noerr-Pennington* doctrine withheld immunity where the petitioning activity, "ostensibly directed toward influencing governmental action, is a mere sham to cover ... an attempt to interfere directly with the business relationships of a competitor." *Noerr*, *supra*, at 144.

In *California Motor Transport Co., Inc. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), the Court extended the *Noerr-Pennington* doctrine to protect the right of citizens to bring actions before administrative agencies and in the courts. The Court held that such actions were immunized by the First Amendment from statutory liability, unless they were mere "shams," *i.e.*, objectively baseless.

In *Bill Johnson's Restaurants v NLRB, supra, 461 U.S. 731 (1983)*, the Court made clear that the same First Amendment principles applied to litigation challenged under the National Labor Relations Act. Expressly citing *California Motor Transport*, the Court held that "the Board may not halt the prosecution of a state-court lawsuit, regardless of the plaintiff's motive, unless the suit lacks a reasonable basis in fact or law." 461 U.S. at 748.

The Court explicitly recognized in *Bill Johnson's* that the same First Amendment

considerations are present when a party claims that a lawsuit violates the NLRA as are present when a party claims that a lawsuit violates the Sherman Act:

> In *California Motor Transport* ... we recognized that the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances. Accordingly, we construed the antitrust laws as not prohibiting the filing of a lawsuit, regardless of the plaintiff's anti-competitive intent or purpose in doing so, unless the suit was a "mere sham" filed for harassment purposes .... ***We should be sensitive to these First Amendment values in construing the NLRA in the present context.***

Bill Johnson's, *supra*, at 741 (emphasis added).

In *dicta*, the *Bill Johnson's* Court briefly opined that "[I]f judgment goes against the employer or is otherwise shown to be without merit, the employer has had its day in court, the interest of the State in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the § 8(a)(1) and § 8(a)(4) unfair labor practice case...." *Id.* at 747. However, the Court nowhere addressed in *Bill Johnson's* the First Amendment standard that should apply to such post-judgment unfair labor practice cases.

Subsequently, in *Professional Real Estate Investors v. Columbia Pictures Industries, Inc.*, 508

U.S. 49 (1993), the Court clarified the standard for protecting litigants' rights under the First Amendment in the context of completed litigation. Far from viewing the "objectively baseless" formulation as creating any sort of inconsistency with the previously decided *Bill Johnson's* holding, the Court in *Professional Real Estate* expressly cited *Bill Johnson's* as one of many antecedent authorities that supported the announced rule:

> Since *California Motor Transport*, we have consistently assumed that the sham exception contains an indispensable objective component .... Whether applying *Noerr* as an antitrust doctrine ***or invoking it in other contexts***, we have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham .... Indeed, by analogy to *Noerr*'s sham exception, we held that even an "improperly motivated" lawsuit may not be enjoined under the National Labor Relations Act as an unfair labor practice unless such litigation is "baseless." *Bill Johnson's*, 461 U.S. at 743-44.

Id. at 58-59 (emphasis added).

Since *Professional Real Estate Investors*, it should thus be clear that "whether applying *Noerr* as an antitrust doctrine or invoking it in other contexts," a lawsuit is protected by the First Amendment from statutory liability unless it is "objectively baseless."

The Court's First Amendment standard has been broadly and uniformly applied in every imaginable context, in accordance with the Court's holding.[4]

Among the many examples of such uniform application of *Noerr-Pennington* outside the antitrust field are *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (civil conspiracy claim); *Herr v. Pequea Township*, 274 F.3d 109 (3d Cir. 2001) (claim arising under substantive due process clause); *Eaton v. Newport Board of Educ.*, 975 F.2d 292 (6th Cir. 1992) (federal civil rights cause of action); *Brownsville Golden Age Nursing Home v. Wells*, 839 F.2d 155 (3d Cir. 1988) (state law tort actions); *Video Int'l Prod., Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075, (5th Cir. 1988) (federal civil rights cause of action); *Evers v. County of Cluster*, 745 F.2d 1196 (9th Cir. 1984) (same).

As this Court further explained in *Professional Real Estate*, "objectively baseless" and "non-meritorious" are synonymous terms which both mean that "no reasonable litigant could realistically expect success on the merits" at the time a suit is filed. The Court expressly applied the phrase "meritorious litigation" to refer to cases that were not successful but nonetheless had a minimal level of merit, *i.e.*, cases with "genuine [legal] substance" or "valid claims." *See* 508 U.S. at 55 n.3.

---

[4] *See We, Inc. v. City of* Philadelphia, 174 F.3d 322, 327 (3rd Cir. 1999) ("The purpose of *Noerr-Pennington* as applied in areas outside the antitrust field is the protection of the right to petition."); *Gen Probe, Inc. v. Amoco Corp., Inc.*, 926 F. Supp. 948, 956 (S.D. Cal. 1996) ("*Noerr*[*-Pennington*] immunity bars any claim, federal or state, common law or statutory, that has as its gravamen constitutionally protected petitioning activity.").

The Court also acknowledged prior authority that a "successful" lawsuit was not necessarily measured by whether it ultimately prevailed in court, but, rather, whether it constituted a reasonable or genuine effort to invoke the judicial process: "a successful lawsuit [i]s a 'genuine attemp[t] to use the ... adjudicative process legitimately' rather than 'a pattern of baseless, repetitive claims'") (quoting *Vendo Co. v. Lekto-Vend Corp.*, 433 U.S. 623, 645 (1977) (Blackmun, J., concurring)). Thus, this Court expressly noted that even when the defendant has lost, "a court must 'resist the understandable temptation to engage in *post hoc* reasoning by concluding' that an ultimately unsuccessful 'action must have been unreasonable or without foundation.'" 508 U.S. at 60 n.5

The *Professional Real Estate* Court further relied on the prior holding in *Christiansburg Garment v. EEOC*, 434 U.S. 412, 421-22 (1978), that an award of attorneys fees against an unsuccessful plaintiff under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, was permissible only when the completed action was found to have been "meritless."[7] Again, the Court defined "meritless" in its *Christiansburg* decision as "unreasonable or without foundation," the

---

[7] *See also Bruce v. City of Gainesville*, 177 F.3d 949, 951 (11th Cir. 1999) (Title VII action is not "meritless" for purposes of assessing attorney fees simply because plaintiff lost the case; case must be groundless or without foundation); *Jones v. United States*, 613 F. Supp. 1311, 1314, n.10 (5th Cir. 1980) ("meritless" suit warranting fees under civil rights act means "groundless or without foundation," rather than simply that the party "ultimately lost its case").

same standard reaffirmed by the Court in *Professional Real Estate, 508 U.S. at 60, n.5.*[8]

Finally, in *Bill Johnson's* itself, this Court made clear that it was adhering to the well accepted definition of "meritorious," described above, in the following statement:

> Although it is not unlawful under the Act to prosecute a ***meritorious*** action, the same is not true of suits based on insubstantial claims – suits that lack, to use the term coined by the Board, a "***reasonable basis.***" Such suits are not within the scope of First Amendment protection.

461 U.S. at 743 (emphasis added).

It is well established then, that this Court's use of the term "meritorious," both before and after *Bill Johnson's,* and even within the *Bill Johnson's opinion,* is consistent with the "objectively baseless" standard set forth in *Professional Real Estate* and advocated by BE&K in the present case. Notwithstanding the clearly expressed intention of the Court to establish a uniform First Amendment

---

[8] Similarly, courts have uniformly held that the default judgment vacatur requirement of establishing a "meritorious defense" means that "the defendant must state 'a defense good at law' which is sufficient if it contains 'even a hint of a suggestion which, proven at trial, would constitute a complete defense.'" *Thompson v. American Home Assur. Co.*, 95 F.3d 429, 434 (6th Cir. 1996); *accord, Keegel v. Key West & Caribbean Trading Co., Inc.*, 627 F.2d 372, 373 (D.C. Cir. 1980). *See also Coon v. Grenier*, 867 F.2d 73, 77 (1st Cir. 1989) ("meritorious defense" exists if allegations plausibly suggest existence of facts which, if proven at trial, would be a cognizable defense).

standard immunizing all but "objectively baseless" lawsuits, however, the NLRB and the Sixth Circuit have misapplied the *Bill Johnson's* dicta to carve out a wholly unwarranted exception from *Professional Real Estate Investors. See BE&K Construction Co.*, 329 NLRB No. 68 (1999) (J.A. 43a – 44a).; *see also Petrochem Insulation, Inc.*, 330 NLRB No. 10, *10-11 (1999); *Braum Elec. Co., Inc.*, 324 NLRB 1 (1997).

The *Bill Johnson's dicta* regarding completed litigation does not, as the Board and the Sixth Circuit seem to believe, relieve the NLRB of the duty to find an employer's suit to be non-meritorious within the judicially accepted meaning of that term. The *Bill Johnson's* Court said only that, upon a finding that such litigation was "without merit," the Board "may" proceed to adjudicate the unfair labor practice case. 461 U.S. at 744. Having already referred to "meritorious" suits as meaning those that are "reasonably based," *Id.* at 743, in accordance with its well settled definition of the term, the Court's *dicta* does not support creation of an entirely new First Amendment standard. The NLRB's and Sixth Circuit's interpretation of *Bill Johnson's* should therefore be rejected.

Several other courts of appeals have rejected or questioned the NLRB's reading of *Bill Johnson's*. In *NLRB v Vanguard Tours, Inc.*, 981 F. 2d 62 (2d Cir. 1992), the Second Circuit declined to accept the Board's method of determining lack of "merit" in the case of a withdrawn lawsuit (for which the test of merit under *Bill Johnson's* is listed in the same category as a judicially determined judgment). The *Vanguard* court held:

> Because the Board ***did not find that Vanguard's suit lacked a reasonable basis in fact or law***, either at the outset or at the point when the employer briefly permitted it to remain pending, the Board's determination that the lawsuit was an unfair labor practice ***may not be sustained***.

Id. at 66 (emphasis added).

Two other courts of appeals considering this issue have raised serious questions about the bifurcated standard created by the NLRB's interpretation of the *Bill Johnson's dicta*, in light of the subsequent holding in *Professional Real Estate*. Both courts ultimately upheld the NLRB's position, but both called upon this Court to clarify this critically important anomaly in the law.

In *White v. Lee*, 227 F. 3d 1214 (9th Cir. 2000), a case decided under the Fair Housing Act, the court was nevertheless called upon to address the apparent conflict created by the two Supreme Court decisions. The court declared that, but for a prior holding by another circuit panel in *Diamond Walnut Growers, Inc. v. NLRB*, 53 F. 3d 1085, 1088 (9th Cir. 1995), the court would "ordinarily be tempted to treat these statements in *Bill Johnson's* as *dicta*, because they were not pertinent to the case before the Court and because in *Professional Real Estate Investors*, decided ten years later, the Court did not even mention the *Bill Johnson's* statements when holding that unsuccessful lawsuits receive the traditional protection described in *California Motor Transport*, specifically including the requirement of objective

baselessness." *See White v. Lee, supra*, 227 F. 3d at 1235-36.

The *White* court reemphasized this point in its footnote 18, as follows:

> Particularly notable is the fact that in *Professional Real Estate Investors*, the Court cited the holding in *Bill Johnson's* that "by analogy to *Noerr's* sham exception, . . . even an 'improperly motivated' lawsuit may not be enjoined under the National Labor Relations Act as an unfair labor practice unless such litigation is 'baseless.'" 508 U.S. at 59. However, rather than applying or even citing the subsequent *Bill Johnson's* statements regarding unsuccessful lawsuits, the Court emphasized that a litigant's failure to prevail did *not* establish the objective baselessness of his suit, and it proceeded to apply *Noerr-Pennington* immunity to an action that had in fact been defeated on summary judgment. Had the Court believed that the statements in *Bill Johnson's* had any effect, we would expect that it would have explained why it did not apply them in the case before it. The fact that the Court did not do so indicates that it considered the statements.dicta.

White v. Lee, supra, 227 F. 3d at 1235, n.18.

More recently, while upholding another NLRB decision relying on *Bill Johnson's* in the face of *Professional Real Estate*, the Court of Appeals for the D.C. Circuit expressed significant reservations over the substantial limits on First Amendment protections caused by the Board's view of the law. The D.C. Circuit strongly suggested that this Court should take up and clarify the differing standards. *Petrochem Insulation, Inc. v. NLRB*, 240 F. 3d 26, 32 (D.C. Cir. 2001).

The confusion reflected in these cases, and in the Sixth Circuit's holding in the present case, is the product of a misapplication of *Bill Johnson's*. The point of the *Bill Johnson's* holding was not to change the substantive standards applicable to different phases of litigation, but simply to establish different *procedures* for the NLRB to follow in the two types of situations. This Court held that the Board should not normally adjudicate litigation-related unfair labor practice charges at all while the lawsuits remained ongoing; but "once the employer has had his day in court," the Board *could* proceed to such adjudication. Nowhere did this Court say that a different substantive standard should apply during that subsequent unfair labor practice adjudication.

The view expressed by the Sixth Circuit and the NLRB, and by some other courts on this point,[5] makes no sense. In order to accept the Sixth Circuit's analysis, one would have to accept that this Court has departed from its long held notions of providing First Amendment protections for all but "nonmeritorious" litigation, and has defined that term everywhere else

[5] *See Diamond Walnut Growers v. NLRB, supra*, 53 F. 3d at 1088

as meaning "objectively baseless;" that the Court *sub silentio* completely changed its standard in one narrow category of cases under the NLRA; and that the Court has failed in subsequent decisions to acknowledge any such change. This Court's own statements, in both *Bill Johnson's* itself and in *Professional Real Estate*, to the effect that labor and antitrust laws should be interpreted *in pari materia* vis-à-vis the First Amendment, utterly belie the interpretations of the Sixth Circuit and the NLRB.

In any event, regardless of what confusion might have existed as a result of the dicta in *Bill Johnson's*, this Court's decision *in Professional Real Estate* resolved any prior ambiguities. This is particularly clear when the language of *Professional Real Estate* is read in tandem with the references to *California Motor Transport* contained in the *Bill Johnson's* opinion. The Court has now established a uniform system for balancing First Amendment considerations of access to the courts with other federal statutory interests such as labor or antitrust law. In the face of this continuum of case law, the Sixth Circuit and the NLRB must be found to have erred in their interpretation of *Bill Johnson's*, and their decisions should be set aside. Alternatively, to the extent that *Bill Johnson's* is read as somehow supporting the NLRB's Order in this case, then that portion of the Court's opinion must be deemed to have been overruled or superceded by *Professional Real Estate*, and should be clearly disavowed by this Court now. Properly construed in light of *Professional Real Estate*, *Bill Johnson's* should have precluded the Board here from making a per se finding of "meritlessness" without examining the objective reasonableness of BE&K's claims.

II. The Erroneous Bifurcated Standard Created By The NLRB And The Sixth Circuit Operates To Chill Employers' First Amendment Rights, And Its Unique Application To The NLRA Is Unjustified.

The bifurcated standard applied by the NLRB and enforced by the Sixth Circuit is both unfair and untenable as a guideline for behavior because it is impossible for employers to know in advance how litigation will be resolved. It is therefore also impossible for them to avoid committing an unfair labor practice except by not going to court in the first instance. Certainty of outcome, however, should not be the test by which an employer evaluates instituting a potential lawsuit. As Justice Stevens stated in concurrence with the majority opinion in *Professional Real Estate*, "uncertainty about the possible resolution of unsettled questions of law is characteristic of the adversary process. Access to the courts is far too precious a right for us to infer wrongdoing from nothing more than using the judicial process to seek ... advantage in a doubtful case." *Professional Real Estate*, *supra*, at 69 (Stevens, J. concurring).

Faced with the requirement of divination at the outset of a case, many employers will undoubtedly forego exercise of their rights to avoid incurring statutory liability for having predicted wrongly. Application of the bifurcated standard applied by the Board and enforced by the Sixth Circuit improperly puts employers at risk of violating the law. In addition, such a rule would stagnate the development of the law, as employers with innovative legal theories would be deterred from bringing these

novel theories to court and risking liability under the NLRA.

The Respondents have argued that "different accommodations" are called for under the antitrust laws and under the NLRA to reflect that there are "distinct statutory schemes, with different purposes and remedies." (Union Opp. to Pet. for Cert. at 8, n.7). According to the Unions, the NLRB's stricter standard for reviewing completed litigation is needed to protect associational rights of employees from the potential chilling effect of a lawsuit.

These arguments do not justify the bifurcated standard that the NLRB has created. Indeed, the NLRB made such arguments in claiming the right to intervene in ongoing litigation in *Bill Johnson's, and this Court rejected them in that context.* Whatever chilling effect litigation has upon employee rights, it is surely no greater when the litigation is over and the employees (or in this case the non-employee unions) have won their case. At that point, there is actually *less* need for the NLRB to find the completed lawsuit to be an unfair labor practice, unless the suit is found to be objectively baseless.

The Respondents' arguments also ignore the "checkered" history of the NLRB's treatment of employer litigation cited in *Bill Johnson's*, 461 U.S. at 737. There was certainly no deeply rooted tradition at the Board, prior to *Bill Johnson's*, of finding reasonably based employer litigation to be unlawful or of distinguishing between pending suits and completed actions with regard to the standard of review. For nearly two decades, beginning with *Clyde Taylor Co.*, 127 NLRB 103, 109 (1960), the NLRB applied to all litigation, whether ongoing or

completed, a standard substantially similar to this Court's *Bill Johnson's/Professional Real Estate* test. Even when the NLRB adopted a more intrusive standard of review in *Power Systems*, 229 NLRB 445 (1978), the Board did not apply that standard differently to ongoing, as opposed to complete, employer lawsuits.

The *Power Systems* standard was in place at the Board for only five years prior to *Bill Johnson's*, and the *Power Systems* decision itself was denied enforcement by the Seventh Circuit, 601 F. 2d 936 (7th Cir. 1979). Meanwhile, the body of NLRB case law which has developed since the issuance of *Bill Johnson's* has been premised entirely upon the Board's misreading of the language of this Court. The NLRB has established no basis in the NLRA itself for creating a bifurcated First Amendment standard of review for employer litigation.

Finally, the Respondents' position also ignores the well settled requirement that the NLRB is under a duty to accommodate its statutory scheme to other equally important Congressional objectives. *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942). Here, Congress has determined under both the Antitrust laws and the Labor Management Relations Act that employers should be permitted to file objectively based litigation to effectuate the policies of those laws, without fear of being found to have violated the law upon an unsuccessful result. *Professional Real Estate Investors, supra*; *see also Summit Valley Industries, Inc. v. United Brotherhood of Carpenters & Joiners*, 456 U.S. 717 (1982) (barring award of attorneys fees to prevailing party under Section 303 of the LMRA).

Thus, the First Amendment, the *Professional Real Estate Investors* decision, and common sense all dictate that the NLRB be required to judge completed litigation under the uniform "objective basis" test applicable in all other contexts. This result is particularly compelled where the lawsuit at issue is filed pursuant to a federal statute having equal standing with the NLRA, such as the antitrust laws or the Labor Management Relations Act.

III. BE&K's Suit Was Unquestionably Filed With "Probable Cause" And Was Not "Objectively Baseless."

As noted above, the Sixth Circuit accepted the Board's determination that BE&K's claims were without merit under the Board's erroneous bifurcated standard, merely because BE&K lost some of its claims on summary judgment, and otherwise withdrew others with prejudice. BE&K's claims, however, easily meet the standards of a meritorious claim articulated by this Court in *Professional Real Estate*, and the decisions of the NLRB and the court of appeals must be set aside.

At the outset, the Board and the Sixth Circuit ignored the many aspects of the Ninth Circuit's holding as to which BE&K *prevailed*. The *USS-POSCO* court agreed with BE&K's basic antitrust theories and further agreed that a *pattern* of litigation is to be judged by a different standard than a single filing. The court of appeals further held that the Unions' activity was not per se exempt from challenge under the antitrust laws, and that BE&K had a reasonable basis for its litigation. Clearly, the

Ninth Circuit's rulings were not a complete repudiation of BE&K's theories, nor a complete victory for the unions.

It must also be recalled that ***the sole stated reason*** for the Ninth Circuit's failure to rule completely in BE&K's favor was that "more than half of all the [union] actions as to which we know the result (15 out of 29 by the Court's count) turn out to have merit." This, the Ninth Circuit believed, could not be reconciled with BE&K's charge that the unions were filing lawsuits "willy-nilly without regard to success." 31 F.3d at 811 (J.A. 78-79).[6] At the time BE&K filed its initial and amended complaints, however, the final count of successful vs. unsuccessful union actions was neither known nor knowable to it, and BE&K had every reason to believe that many of the suits that were then pending would be decided adversely to the unions.

It thus appears from the Ninth Circuit's decision that very slight differences in the ultimate disposition of some of the unions' lawsuits would have resulted in a total victory for BE&K. To now hold, as the Sixth Circuit would do – and with all the benefits of hindsight – that BE&K's lawsuit was without merit merely because it "lost" would be tantamount to requiring BE&K to predict both a union's success ***and*** its own before it could exercise its constitutional right to petition the courts.

---

[6] The Ninth Circuit easily could have counted the actions differently, in that many of the 15 "successful" union actions listed by the *USS-POSCO* court (all against Eichleay) should have been treated as consolidated, or fewer, actions.

Moreover, after the Ninth Circuit decision issued, counsel for the ***Unions*** issued a sworn declaration expressing "great concerns" over the outcome. Benson Decl. at ¶ 2 (J.A. 82). Among the Unions' concerns was that BE&K's Ninth Circuit "loss" had a significant positive precedential value for BE&K, establishing that unions may not engage in a pattern or practice of successive filings with the government against a non-union contractor, without regard to the merits of the filings, essentially for purposes of harassment. In other words, in certain important aspects of the litigation, BE&K's claims not only had "merit" but actually resulted in positive legal rulings which, in significant respects, made BE&K the prevailing party.[7]

As this Court has also observed, even where a party's claims do not present a material dispute of fact sufficient to require a trial, they may still present a good faith dispute over the law, and how the law will apply to and resolve the otherwise undisputed facts. *Professional Real Estate*, *supra* 508 U.S. at 64. The mere fact that a party loses a summary judgment motion, or an appeal therefrom, is not in and of itself, probative of whether the party's action was "reasonably based," brought with "objective good faith," or otherwise "genuinely" sought relief. A party may lose a summary judgment simply because a court disagrees with its interpretation of the law, or its

---

[7] Of course, BE&K does not deny that the district court's judgment in favor of the Unions' was ultimately affirmed by the Ninth Circuit. It is unnecessary for this Court to find that BE&K "prevailed" in any sense in its suit against the Unions in order to reverse the NLRB's unfair labor practice Order. The point being made here is simply that the outcome in the Ninth Circuit was far closer than the NLRB was willing to acknowledge, and clearly supports a finding that BE&K's litigation was "reasonably based," not "objectively baseless."

"objectively good faith argument for the extension, modification or reversal of existing law. " *Id.* at 65 (citing Fed. Rule Civ. P. 11).[8]

In close or novel cases, a party is often not able to determine before filing whether its arguments will be accepted. Because of this inherent uncertainty, as this Court recognized, it is unreasonable to penalize the litigant who brings an "objectively reasonable" claim simply because a court finally disagrees with its view of the law or the facts. Similarly, it would be unreasonable to penalize a litigant merely for having withdrawn a claim voluntarily, particularly where, as here, that claim is withdrawn for a specific, strategic purpose.[9]

In the present case, putting the final outcome aside, numerous facts support the contention that BE&K's claims were far from "objectively baseless." At the time the BE&K action was first filed, and during its pendency, a large and respectable body of authority held that a series of repetitive civil and administrative filings, even though partially successful, was not irrebuttably immune from challenge as a sham. *See Otter Tail Power Company v. United States*, 410 U.S. 366, 380 (1973); *California Motor Transport*, *supra*, at 513; *and cases cited at Professional Real Estate*, *supra*, at 55 n. 3. Thus, on the theory that the unions' litigation was by-and-large

---

[8] Indeed, if the Board's interpretation of *Bill Johnson's* were to prevail, even a filing appropriate under Rule 11 would nonetheless be subject to sanctions before the NLRB if it did not prevail.

[9] As noted in the Ninth Circuit's opinion, BE&K voluntarily dismissed with prejudice other potentially viable counts of its complaint (for example, those concerning violence) in order to obtain a review of the district court's antitrust rulings. *USS-POSCO*, *supra*, at 805.

a sham, BE&K reasonably believed that it *could* point to the unions' litigation as being unlawfully "coercive" under the Act.

There were likewise ample grounds for amending BE&K's complaint to include antitrust claims. In the course of this litigation the employers collected literally dozens – perhaps hundreds – of documents in which the union representatives openly expressed concern regarding their loss of "market share," and extolling the efficacy of their harassing, "government petitioning" tactics in reversing the trend. The head of the San Francisco Building Trades Council was quoted (from a letter he wrote to the heads of other area building trades councils) as vowing to "eliminate" non-union competition from the Bay Area through these and other tactics. Throughout the course of the entire dispute, the unions, their representatives and lawyers made little effort to conceal that their real motive was to drive non-union contractors out of the market.

Apart from these candid admissions of an "anti-competitive" objective, there then existed abundant authority for the proposition that a pattern of sham petitioning designed to drive competitors from a market by using the sheer burdens of the litigation itself was actionable in antitrust. BE&K had only to look to the long line of *Noerr-Pennington* sham cases for encouragement. BE&K's counsel were no strangers to these antitrust principles. Its then-lead counsel had successfully prosecuted three significant antitrust cases on sham theories.

In one of the many ironies surrounding this case, furthermore, the legal theory underlying the Section 303 claims that BE&K's voluntarily

dismissed[10] subsequently was endorsed by the Board itself in 1993. In *TAME T.I.C. & United Association of Journeymen, etc. of the Plumbing and Pipefitting Industry, etc.* (*TAME*), Case No. 27-CC-826, 827 (1993), the Board's Division of Advice recommended going to complaint against various UA locals (including one of the unions here) on virtually the same theories as were first asserted by BE&K in its Section 303 action. The Board not only went to complaint in the *TAME* matter, but the unions settled the matter rather than defend their actions before the NLRB. Surely, these actions by the NLRB's General Counsel demonstrate an "objective basis" for BE&K's identical claim.

As further noted above, BE&K filed its case only after intensive review and advice from national experts in the antitrust and labor fields. Indeed, independent commentators agreed with BE&K's assessment of the merits of its claims. *See* Durie & Lemley, *The Antitrust Liability of Labor Unions for Anti-Competitive Litigation*, 80 CAL. L. REV. 757 (1992). While the authors' view did not ultimately prevail, it is certainly indicative of whether a "reasonable litigant could realistically expect success on the merits."

To summarize, the Unions here embarked upon an obvious program intended to exploit the coercive effect of litigation and regulatory petitioning in an attempt to get UPI to cease doing business with

---

10 The NLRB reflexively relied on BE&K's voluntary dismissal of these claims to find that they too were nonmeritorious. (J.A. 48a-49a). As noted above, the Second Circuit has rejected any such presumption. *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 65 (2d Cir. 1992).

BE&K. The law confronting BE&K as it tried to respond to the Unions' novel strategy was, and to some extent remains, unclear, particularly as it relates to the *Noerr-Pennington* doctrine and its sham exception. Under *Professional Real Estate*, it can hardly be said that "no reasonable litigant could have realistically expected to secure favorable relief" on the claims BE&K brought. Accordingly, it cannot be said that those claims were "baseless," and the NLRB could not have made such a finding under the properly applied Professional Real Estate/Bill Johnson's standard.

CONCLUSION

In *Professional Real Estate*, this Court stated that "whether applying *Noerr* as an antitrust doctrine or invoking it in other contexts," a lawsuit is protected by the First Amendment from statutory liability unless it is "objectively baseless." As this Court further explained, "objectively baseless" means that "no reasonable litigant could realistically expect success on the merits" at the time a suit is filed. In the present case, BE&K's claims were unquestionably founded on "probable cause" and were not, therefore, "objectively baseless."

The NLRB and the Sixth Circuit erred in holding that under *Bill Johnson's*, the NLRB may impose liability on an employer for filing a losing retaliatory lawsuit, even if the employer could show the suit was not objectively baseless under *Professional Real Estate*. The Sixth Circuit's reading of *Bill Johnson's* conflicts with *Professional Real Estate* and infringes on the constitutional rights of

employers. For all of the reasons stated herein, BE&K respectfully requests that this Court reverse the decision of the Sixth Circuit and deny the enforcement of the NLRB's Order against BE&K.

Respectfully submitted,

Maurice Baskin
Counsel of Record for Petitioner
Karen Vossler
Venable, LLP
1201 New York Ave., N.W.,
Suite 1000
Washington, D.C. 20005
202-962-4800

MAR 21 2002

No. 01-518

In the Supreme Court of the United States

BE&K CONSTRUCTION COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARTHUR F. ROSENFELD
General Counsel
JOHN E. HIGGINS, JR.
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
NORTON J. COME
Deputy Associate General Counsel
JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

THEODORE B. OLSON
Solicitor General
Counsel of Record
LAWRENCE G. WALLACE
Deputy Solicitor General
AUSTIN C. SCHLICK
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Did the Court of Appeals err in holding that under *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983), the NLRB may impose liability on an employer for filing a losing retaliatory lawsuit, even if the employer could show the suit was not objectively baseless under *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993)?

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	2
Summary of argument	13
Argument:	
The Board may find an unfair labor practice and impose a make-whole remedy when an employer prosecutes, with a retaliatory motive, a losing lawsuit against employees, even if the suit was not "objectively baseless"	17
A. The Court's decision in *Bill Johnson's* is entitled to repose	18
B. *Professional Real Estate Investors* did not establish a "uniform" constitutional rule	27
C. The *Bill Johnson's* Court reasonably distinguished the Board's authority to remedy a retaliatory suit after judgment from the Board's authority to enjoin prosecution of a retaliatory suit	35
D. The holdings of *Bill Johnson's* and *Professional Real Estate Investors* reflect the different statutory schemes at issue in those cases	39
Conclusion	49
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Alexander v. *United States*, 509 U.S. 544 (1993)	36, 37
Alyeska Pipeline Serv. Co. v. *Wilderness Soc'y*, 421 U.S. 240 (1975)	15, 33, 34

Cases—Continued: Page

American Pac. Concrete Pipe Co., 292 N.L.R.B. 1261 (1989) 47
Bakery, Confectionery & Tobacco Workers Int'l Union, Local 6, 320 N.L.R.B. 133 (1995) 47
Bantam Books, Inc. v. *Sullivan*, 372 U.S. 58 (1963) 36-37
Beth Israel Hosp. v. *NLRB*, 437 U.S. 483 (1978) 25
Bill Johnson's Restaurants, Inc. v. *NLRB*, 461 U.S. 731 (1983) ..... *passim*
Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) 41-42
Booster Lodge No. 405, IAM, 185 N.L.R.B. 380 (1970), aff'd in part, 459 F.2d 1143 (D.C. Cir. 1972), rev'd *sub nom. NLRB* v. *Boeing Co.*, 412 U.S. 67 (1973) 20
Braun Elec. Co., 324 N.L.R.B. 1 (1997) 26, 47
Brecht v. *Abrahamson*, 507 U.S. 619 (1993) 24
Brown v. *Federation of State Med. Bds.*, 830 F.2d 1429 (7th Cir. 1987) 32
California Motor Transp. Co. v. *Trucking Unlimited*, 404 U.S. 508 (1972) 4, 5
CBS, Inc. v. *Davis*, 510 U.S. 1315 (1994) 37
Chambers v. *NASCO, Inc.*, 501 U.S. 32 (1991) 33, 34, 35, 45
Chevron U.S.A., Inc., 244 N.L.R.B. 1081 (1979) 48
Christiansburg Garment Co. v. *EEOC*, 434 U.S. 412 (1978) 14, 29
Clinton v. *Jones*, 520 U.S. 681 (1997) 32
Conley v. *Gibson*, 355 U.S. 41 (1957) 37
Control Servs., Inc., 315 N.L.R.B. 431 (1994) 47
Dahl Fish Co., 279 N.L.R.B. 1084 (1986), enforced, 813 F.2d 1254 (D.C. Cir. 1987) 26
Dash v. *NLRB*, 793 F.2d 1062 (9th Cir. 1986) 27
David R. Webb Co., 311 N.L.R.B. 1135 (1993) 43
Diamond Walnut Growers, Inc., 312 N.L.R.B. 61 (1993), enforced, 53 F.3d 1085 (9th Cir. 1995) 47

Cases—Continued: Page

Diamond Walnut Growers, Inc. v. *NLRB*, 53 F.3d 1085 (9th Cir. 1995) 10, 26
Eastern R.R. Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) 4, 5, 23
Edward J. DeBartolo Corp. v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988) 21
Elgin, Joliet & Eastern Ry. v. *Brotherhood of R.R. Trainmen*, 302 F.2d 540 (7th Cir.), cert. denied, 371 U.S. 823 (1962) 31
FTC v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) 28
Farmer v. *United Bhd. of Carpenters, Local 25*, 430 U.S. 290 (1977) 43
Fogerty v. *Fantasy, Inc.*, 510 U.S. 517 (1994) 30
Fleischmann Distilling Corp. v. *Maier Brewing Co.*, 386 U.S. 714 (1967) 46
Franchise Realty Interstate Corp. v. *San Francisco Local Joint Exec. Bd.*, 542 F.2d 1076 (9th Cir. 1976), cert. denied, 430 U.S. 940 (1977) 41
George A. Angle, 242 N.L.R.B. 744 (1978), enforced, 683 F.2d 1296 (10th Cir. 1982) 19
Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) 45
Geske & Sons, Inc. v. *NLRB*, 103 F.3d 1366 (7th Cir.), cert. denied, 522 U.S. 808 (1997) 44
Granite State Joint Bd., Textile Workers Union, Local 1029, 187 N.L.R.B. 636 (1970), enforcement denied, 446 F.2d 369 (1st Cir. 1971), rev'd, 409 U.S. 213 (1972) 20
Grip-Pak, Inc. v. *Illinois Tool Works, Inc.*, 694 F.2d 466 (7th Cir. 1982), cert. denied, 461 U.S. 958 (1983) 33
Hilton v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197 (1991) 26
Hydro-Tech Corp. v. *Sundstrand Corp.*, 673 F.2d 1171 (10th Cir. 1982) 40, 41

Cases—Continued: Page

IAM, Dist. Lodge No. 91 (United Technologies Corp.), 298 N.L.R.B. 325 (1990), enforced, 934 F.2d 1288 (2d Cir. 1991), cert. denied, 502 U.S. 1091 (1992) 26, 47
Illinois Brick Co. v. *Illinois*, 431 U.S. 720 (1977) 25
International Org. of Masters, Mates & Pilots, 224 N.L.R.B. 1626 (1976), enforced, 575 F.2d 896 (D.C. Cir. 1978) 20
J.E.M. Ag Supply, Inc. v. *Pioneer Hi-Bred Int'l, Inc.*, 122 S. Ct. 593 (2001) 27
Kaiser Aluminum & Chem. Corp. v. *Bonjorno*, 494 U.S. 827 (1990) 34
Lancelotti v. *Fay*, 909 F.2d 15 (1st Cir. 1990) 32
Lawson v. *Murray*, 515 U.S. 1110 (1995) 37
Lewis v. *Casey*, 518 U.S. 343 (1996) 35-36
Lupia v. *Stella D'Oro Biscuit Co.*, 598 F.2d 1163 (7th Cir. 1978), cert. denied, 440 U.S. 982 (1979) 40
Madsen v. *Women's Health Ctr., Inc.*, 512 U.S. 753 (1994) 37
McDonald v. *Smith*, 472 U.S. 479 (1985) 36
Minnesota State Bd. for Cmty. Colls. v. *Knight*, 465 U.S. 271 (1984) 35
NAACP v. *Button*, 371 U.S. 415 (1963) 45
NAACP v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982) 28
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 (1974) 40
NLRB v. *Burnup & Sims, Inc.*, 379 U.S. 21 (1964) 47
NLRB v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979) 21
NLRB v. *Gissel Packing Co.*, 395 U.S. 575, 617 (1969) 45
NLRB v. *International Union of Operating Eng'rs, Local 520*, 15 F.3d 677 (7th Cir. 1994) 26-27
NLRB v. *J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969) 44
NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) 18

Cases—Continued: Page

NLRB v. *Kentucky River Cmty. Care, Inc.*, 532 U.S. 706 (2001) 24
NLRB v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978) 43
NLRB v. *Transportation Mgmt. Corp.*, 462 U.S. 393 (1983) 18
NLRB v. *United Food & Commercial Workers Union, Local 23*, 484 U.S. 112 (1987) 42
NLRB v. *Vanguard Tours, Inc.*, 981 F.2d 62 (2d Cir. 1992) 27
Neal v. *United States*, 516 U.S. 284 (1996) 26
New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) 45
Omni Elec., Inc., No. 8-CA-23905, 1991 WL 322617 (NLRB G.C. Dec. 16, 1991) 43
P.S.C. Res., Inc. v. *NLRB*, 576 F.2d 380 (1st Cir. 1978) 43
Paragon Gen. Contractors & Cabinetmakers, Inc., No. 32-CA-18569-1, 2001 WL 1155402 (NLRB G.C. June 22, 2001) 42
Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989) 25
Petrochem Insulation, Inc. v. *NLRB*, 240 F.3d 26 (D.C. Cir.), cert. denied, 122 S. Ct. 458 (2001) 26, 44, 46
Phelps Dodge Corp. v. *NLRB*, 313 U.S. 177 (1941) 44
Planned Parenthood v. *Casey*, 505 U.S. 833 (1992) 26
Poduska v. *Ward*, 895 F.2d 854 (1st Cir. 1990) 33
Power Sys., Inc., 239 N.L.R.B. 445 (1978), enforcement denied on other grounds, 601 F.2d 936 (7th Cir. 1979) 19, 20
Premier Elec. Constr. Co. v. *National Elec. Contractors Ass'n*, 814 F.2d 358 (7th Cir. 1987) 34
Professional Real Estate Investors, Inc. v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993) 2, 4, 5, 12, 14, 18, 23, 24, 28
Republic Steel Corp. v. *NLRB*, 311 U.S. 7 (1940) 44

Cases—Continued: Page

Roadway Express, Inc. v. *Piper*, 447 U.S. 752 (1980) 29, 35
Rondout Elec., Inc., 329 N.L.R.B. 957 (1999) 47
Rust v. *Sullivan*, 500 U.S. 173 (1991) 25
Sheet Metal Workers' Union, Local 355, 254 N.L.R.B. 773 (1981), enforcement granted in part and denied in part, 716 F.2d 1249 (9th Cir. 1983) 19
Southeastern Promotions, Ltd. v. *Conrad*, 420 U.S. 546 (1975) 36
Summitville Tiles, Inc., 300 N.L.R.B. 64 (1990) 26, 47
Sure-Tan, Inc. v. *NLRB*, 467 U.S. 883 (1984) 38, 39, 44
Television Wis., Inc., 224 N.L.R.B. 722 (1976) 20
Title Guarantee Co. v. *NLRB*, 534 F.2d 484 (2d Cir.), cert. denied, 429 U.S. 834 (1976) 43
Townsend v. *Holman Consulting Corp.*, 929 F.2d 1358 (9th Cir. 1990) 32
UAW v. *LaSalle Mach. Tool, Inc.*, 696 F.2d 452 (6th Cir. 1982) 31
UAW v. *Russell*, 356 U.S. 634 (1958) 44
Umeko, Inc. v. *New York Coat, Suit, Dress, Rainwear & Allied Workers Union*, 484 F. Supp. 210 (S.D.N.Y. 1980) 31
United Credit Bur. of Am., Inc., 242 N.L.R.B. 921 (1979), enforced, 643 F.2d 1017 (4th Cir.), cert. denied, 454 U.S. 994 (1981) 19
United Mine Workers v. *Pennington*, 381 U.S. 657 (1965) 4
United Stanford Employees, Local 680, 232 N.L.R.B. 326 (1977), enforced, 601 F.2d 980 (9th Cir. 1979) 20
United States v. *Employing Plasterers Ass'n*, 347 U.S. 186 (1954) 37-38
United States v. *Hutcheson*, 312 U.S. 219 (1941) 8
United States v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952) 23

Cases—Continued: Page

W.T. Carter & Brother, 90 N.L.R.B. 2020 (1950), overruled by *Clyde Taylor Corp.*, 127 N.L.R.B. 103 (1960) 19
Wal-Mart Stores, Inc., No. 4-CA-28666, 2001 WL 1155418 (NLRB G.C. Apr. 23, 2001) 42
Wheat Mont. Bakery, No. 19-CA-26575, 1999 WL 1319219 (NLRB G.C. Oct. 19, 1999) 42-43

Constitution, statutes, regulations and rules:

U.S. Const.:
Amend. I ..... *passim*, 1a
Petition Clause 3, 35, 36
Press Clause 36
Speech Clause 36
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 29
§ 706(k), 42 U.S.C. 2000e-5(k) 29
Clayton Act, 15 U.S.C. 12 *et seq.*:
§ 4, 15 U.S.C. 15 40
§ 4(a), 15 U.S.C. 15(a) 41
§ 16, 15 U.S.C. 26 40
Labor-Management Relations Act, 1947, § 303, 29 U.S.C. 187 ..... 6, 11, 42, 45, 46
National Labor Relations Act, 29 U.S.C. 151 *et seq.* 2
§ 3(d), 29 U.S.C. 153(d) 42
§ 7, 29 U.S.C. 157 ..... 2, 3, 10, 11, 13, 16, 18, 19, 28, 45, 46, 47, 1a
§ 8(a), 29 U.S.C. 158(a) 3, 21, 26, 45, 46, 1a
§ 8(a)(1), 29 U.S.C. 158(a)(1) 2, 3, 9, 12, 18, 47
§ 8(a)(4), 29 U.S.C. 158(a)(4) 2
§ 8(b), 29 U.S.C. 158(b) 48
§ 8(b)(4), 29 U.S.C. 158(b)(4) 6, 42
§ 8(e), 29 U.S.C. 158(e) 48
§ 10(c), 29 U.S.C. 160(c) 3, 12, 43, 2a
§ 10(*l*), 29 U.S.C. 160(*l*) 48
Norris-LaGuardia Act § 7, 29 U.S.C. 107 31

Statutes, regulations and rules—Continued:	Page
Securities Exchange Act of 1934 § 10(b), 15 U.S.C. 78j(b)	42
Sherman Act, ch. 647, 26 Stat. 209 (15 U.S.C. 1 *et seq.*)	4
§ 1, 15 U.S.C. 1	4, 6
§ 2, 15 U.S.C. 2	4, 6
17 C.F.R. 240.10b-5	42
29 C.F.R.:	
Section 101.5	42
Section 101.6	42
Sections 102.30-102.31	43
Fed. R. Civ. P.:	
Rule 11	7, 8, 9, 31, 32
Rule 11 (1983)	32
Rule 11(b)	31
Rule 11(b) advisory committee's note (1993)	32
Rule 11(b)(1)	15, 31
Rule 11(b)(2)	32
Rule 11(c) advisory committee's note (1993)	32
Rule 11(c)(2)	32
Miscellaneous:	
Carol R. Andrews: *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 Ohio St. L.J. 557 (1999)	36, 45
Motive Restrictions on Court Access: A First Amendment Challenge, 61 Ohio St. L.J. 665 (2000)	32
Black's Law Dictionary (7th ed. 1999)	34
Fowler V. Harper, Fleming James Jr. & Oscar S. Gray, *The Law of Torts* (3d ed. 1996)	33
James D. Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr*, 74 Geo. L.J. 65 (1985)	43
Restatement (Second) of Torts (1977)	33

In the Supreme Court of the United States

No. 01-518

BE&K CONSTRUCTION COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 246 F.3d 619. The decision and order of the National Labor Relations Board (Pet. App. 28a-68a) are reported at 329 N.L.R.B. 717.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 2001. A petition for rehearing was denied on June 28, 2001 (Pet. App. 26a-27a). The petition for a writ of certiorari was filed on September 25, 2001, and granted on January 4, 2002. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are set out in an appendix to this brief. App., *infra*, 1a-2a.

STATEMENT

Petitioner asserts that this Court's decision in *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983), conflicts with the later case of *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), and that *Bill Johnson's* has been, or should be, overruled in relevant part. We therefore begin with a discussion of those two decisions, before turning to the facts of this case and the decisions below.

1. *Bill Johnson's* involved enforcement of the National Labor Relations Act (NLRA or Act), 29 U.S.C. 151 *et seq.* Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the Act, 29 U.S.C. 157. The rights guaranteed in Section 7 include the right to engage in concerted activity "for the purpose of * * * mutual aid or protection." 29 U.S.C. 157. The alleged unfair labor practice in *Bill Johnson's* was an employer's filing and prosecution of a state-court civil suit against employees who picketed one of the employer's restaurants. The National Labor Relations Board (Board) found an unfair labor practice in violation of Section 8(a)(1) of the Act (as well as Section 8(a)(4), 29 U.S.C. 158(a)(4)) and ordered the employer to withdraw its state-court complaint and to reimburse the employees for their expenses of defending against the suit, among other remedies. See 461 U.S. at 733-737.

In determining whether to uphold the Board's application of the NLRA, this Court balanced the Board's strong interest in stopping and remedying employer conduct that is intended to restrain employees' protected activities against two "countervailing considerations": (1) the employer's right of access to the courts under the First Amendment's Petition Clause and (2) "the States' compelling interest in the maintenance of domestic peace" through the provision of state-law civil remedies. 461 U.S. at 740-742. Reconciling those competing considerations, the Court agreed with the Board that it is an unfair labor practice under Section 8(a) for an employer "to prosecute an unmeritorious lawsuit for a retaliatory purpose," but also held that "the offense is not enjoinable unless the suit lacks a reasonable basis." *Id.* at 749. Thus, the Board may halt the prosecution of a suit that it finds to be an unfair labor practice only if the suit lacks a reasonable basis in fact or law. *Id.* at 748. If the Board is not authorized to enjoin the suit under that standard, however, it "must await the results" of the litigation. *Id.* at 749. In that situation, the *Bill Johnson's* Court explained, the Board later may find that the lawsuit violated Section 8(a)(1) and constituted an unfair labor practice "[i]f judgment goes against the employer * * * or if his suit is withdrawn or is otherwise shown to be without merit," and if the Board determines that the suit was filed in retaliation for the exercise of employees' Section 7 rights. *Id.* at 747. If the Board finds a violation of the NLRA after the lawsuit is complete, it may order any proper relief that would effectuate the policies of the Act—including ordering the employer to reimburse the employees for their attorneys' fees and other expenses of defending against the wrongful suit. *Ibid.* (citing 29 U.S.C. 160(c)).

2. *Professional Real Estate Investors* arose under the Sherman Act.[1] The Court considered the doctrine of antitrust immunity that was first articulated in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), as it applied to a claim that the filing and maintenance of a lawsuit in federal court violated the Sherman Act. See 508 U.S. at 51, 52.

In *Noerr*, the Court had interpreted the Sherman Act in light of the First Amendment right to petition. The *Noerr* Court concluded that "the Sherman Act does not prohibit * * * persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." 365 U.S. at 136-138; see also *United Mine Workers* v. *Pennington*, 381 U.S. 657, 669 (1965) (following *Noerr*). The Court also held, however, that "application of the Sherman Act would be justified" where conduct "ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." 365 U.S. at 144. In *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972), another antitrust case, the Court applied those principles to efforts by "groups with common interests

[1] Section 1 of the Sherman Act, 15 U.S.C. 1, provides that "[e]very contract, combination * * * or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is * * * illegal." Section 2 of the Sherman Act, 15 U.S.C. 2, provides that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony."

* * * to advocate their causes" before the courts. *Id.* at 510-511.

Clarifying *Noerr's* sham exception, the Court held in *Professional Real Estate Investors* that, to be outside the protection of *Noerr* immunity from federal antitrust liability by virtue of that exception, a lawsuit must be *both* "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits" *and* filed in "an attempt to interfere *directly* with the business relationships of a competitor." 508 U.S. at 60-61 (quoting *Noerr*, 365 U.S. at 144). The Court cited *Bill Johnson's* as "h[o]ld[ing] that even an 'improperly motivated' lawsuit may not be enjoined under the National Labor Relations Act as an unfair labor practice unless such litigation is 'baseless.'" *Id.* at 59. Because the *Bill Johnson's* Court had identified an "analogy" between its construction of the NLRA and *Noerr's* sham exception (see 461 U.S. at 744), the Court concluded in *Professional Real Estate Investors* that *Bill Johnson's* supported its holding that an antitrust defendant's "objectively reasonable petitioning" is entitled to *Noerr* immunity against antitrust liability, without regard to the defendant's anticompetitive motive. 508 U.S. at 59.

3. Petitioner in this case is an industrial general contractor whose employees are not unionized. Pet. App. 4a, 32a-33a. In late 1986 or early 1987, USS-POSCO Industries (USS-POSCO) awarded petitioner a contract to modernize a steel mill in Pittsburg, California. Petitioner formed a joint venture with Eichleay Constructors, Inc. (Eichleay) to perform the contract. *Ibid.*

a. In September 1987, petitioner and USS-POSCO filed a complaint in the United States District Court for the Northern District of California against a number of

construction-industry unions. Pet. App. 4a, 33a. The complaint sought damages under Section 303 of the Labor-Management Relations Act, 1947, 29 U.S.C. 187, which authorizes a private cause of action against labor organizations that engage in specified unfair labor practices. The federal-court complaint filed by petitioner and USS-POSCO alleged that the construction unions had violated Section 8(b)(4) of the NLRA, 29 U.S.C. 158(b)(4), by lobbying in support of a county ordinance addressing toxic waste emissions in an effort to delay the Pittsburg project; by filing successful collective bargaining grievances against Eichleay; by picketing and handbilling at petitioner's and USS-POSCO's premises; and by filing a state lawsuit—known as the *Pile Drivers* suit—which alleged among other things that petitioner and USS-POSCO had violated California's Health and Safety Code. See Pet. App. 33a-34a; J.A. 15-16, 21.

In July 1988, the federal district court granted summary judgment for the unions on all claims relating to their lobbying and initiation of contractual grievances. J.A. 19-20. With respect to the claim arising from the *Pile Drivers* suit, the district court concluded that further discovery was appropriate to determine whether, under *Bill Johnson's*, petitioner and USS-POSCO had established an actionable unfair labor practice. J.A. 20.

In October 1988, petitioner and USS-POSCO filed an amended complaint that alleged claims similar to those in the initial complaint, including the claims on which the district court had already granted summary judgment for the unions. See J.A. 26-27. The amended complaint also added a new claim for treble damages under Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2. See Pet. App. 6a, 35a.

In May 1989, the district court granted the defendant unions summary judgment on the claim that the *Pile Drivers* suit was an unfair labor practice. The district court explained that it was undisputed that five of the defendant unions had not been parties to the *Pile Drivers* action, and the court accordingly dismissed the claim against these defendants. J.A. 24-25. Petitioner and USS-POSCO, the district court continued, had failed to cite any evidence that the *Pile Drivers* suit lacked a reasonable basis in law. Invoking the *Noerr* immunity doctrine, J.A. 25, the district court deemed that failure fatal to the entire claim that the *Pile Drivers* suit was an unfair labor practice, J.A. 26. Finally, the district court denied petitioner and USS-POSCO leave to re-allege the lobbying and grievance claims that had been dismissed with prejudice in July 1988. J.A. 27-28. The district court did, however, allow petitioner and USS-POSCO to file a revised amended complaint that was consistent with the district court's summary-judgment rulings. J.A. 28.

Petitioner and USS-POSCO filed a six-count second amended complaint. Three counts re-alleged claims that the district court had already resolved in favor of the defendant unions. Three counts alleged claims that the district court had not dismissed. See J.A. 32-33 . In August 1989, the district court struck the three previously dismissed claims and sanctioned petitioner and USS-POSCO under Fed. R. Civ. P. 11 for re-pleading these claims in violation of the court's earlier order. J.A. 33-37; see J.A. 38-42. USS-POSCO then voluntarily dismissed all of its remaining claims with prejudice. Pet. App. 7a, 38a.

Petitioner continued to pursue the suit against the unions. In June 1990, the district court entered a discovery order clarifying that, under the federal labor

laws, petitioner could not prevail on its antitrust claim if it showed only that the defendant unions cooperated with other labor organizations in an effort to maintain area wage standards and working conditions. See J.A. 43-55; see generally *United States* v. *Hutcheson*, 312 U.S. 219, 227-237 (1941) (discussing interplay of antitrust and labor laws). Petitioner conceded that its antitrust claim could not succeed under that rule. In September 1991, therefore, the district court granted the unions summary judgment on petitioner's antitrust claim. J.A. 56-57. Petitioner then voluntarily dismissed with prejudice its remaining claims (which had been pled under the Labor-Management Relations Act) and the district court entered a final judgment in favor of the unions. J.A. 58-61.

b. Petitioner appealed only the dismissal of its antitrust claims and the district court's imposition of Rule 11 sanctions. In July 1994, the United States Court of Appeals for the Ninth Circuit affirmed on the merits but reversed the Rule 11 sanctions award. J.A. 62-80. Although the court of appeals concluded (J.A. 75) that the labor laws did not immunize the unions from antitrust liability for all the activities that they allegedly undertook against petitioner, the court of appeals also held (J.A. 75-79) that the unions could claim immunity under the *Noerr* line of antitrust cases. In particular, the court of appeals held, the sham exception to *Noerr* immunity did not apply to the unions' filing of a series of legal claims against petitioner. "[M]ore than half of all the [unions'] actions as to which we know the results turn[ed] out to have merit," the court noted. J.A. 78. The unions' substantial success in their litigation against petitioner, the court of appeals concluded, "cannot be reconciled with [petitioner's] charge that the unions were filing law-

suits and other actions willy-nilly without regard to success." J.A. 78-79.[2]

The Ninth Circuit reversed the district court's award of Rule 11 sanctions against petitioner. J.A. 79-80. Petitioner's counsel asserted that petitioner had repleaded its previously dismissed claims because of a fear that petitioner otherwise could not take an appeal on these claims at the conclusion of the district court's proceedings. J.A. 79. The court of appeals held that counsel's concern, although mistaken, was not frivolous and petitioner's repetitious pleading therefore did not warrant sanctions. J.A. 80.

4. In October 1995, acting on charges filed by the unions that petitioner had sued in federal court, the Board's General Counsel issued an administrative complaint against petitioner. Pet. App. 9a-10a, 29a. The complaint alleged that petitioner violated Section 8(a)(1) of the NLRA by filing and maintaining a meritless lawsuit against the unions for a retaliatory purpose. *Id.* at 29a-30a. The General Counsel and petitioner filed cross-motions for summary judgment. *Id.* at 29a.

Acting on the summary judgment motions, the Board sustained the General Counsel's complaint. Pet. App. 28a-68a. The Board first concluded that the union ac-

---

[2] Petitioner mischaracterizes the Ninth Circuit's discussion of this issue. Contrary to petitioner's assertion (Br. 6), the Ninth Circuit did *not* "conclude[] that, but for the fact that the Unions had been successful on a slight majority of their claims, much of the Union activity alleged in BE&K's complaints would not have been protected from the antitrust laws." The Ninth Circuit's holding (J.A. 78-79) was that—when an antitrust plaintiff alleges that a course of litigation was sham activity for purposes of *Noerr*—the substantial success of those earlier-resolved actions suffices to disprove the antitrust plaintiff's sham-litigation argument.

tivities that were the subject of petitioner's federal lawsuit—legislative lobbying efforts, state-court litigation, and institution of grievance and arbitration proceedings—all concerned conditions of employment and were protected by Section 7 of the NLRA. *Id.* at 56a. The Board rejected petitioner's argument that the unions engaged in those activities with an unlawful secondary objective of driving non-union contractors out of the California construction market. *Id.* at 33a, 56a-57a. The Board explained that petitioner had made an identical argument in the federal district court when it unsuccessfully alleged violations of the Labor-Management Relations Act, and that petitioner had not appealed the district court's rejection of its argument. *Id.* at 56a-57a.

The Board then applied *Bill Johnson's* and held that both of this Court's requirements for finding that a completed lawsuit constituted an unfair labor practice had been satisfied: petitioner's federal lawsuit "lacked merit" and it was pursued "out of a desire to retaliate against the unions for engaging in protected concerted activity." Pet. App. 62a; see 461 U.S. at 747. The Board first rejected petitioner's contention that, in light of *Professional Real Estate Investors*, petitioner's unsuccessful lawsuit could not be found to lack merit "if there was a reasonable basis for pursuing it." Pet. App. 43a. The Board explained that the completed-lawsuit standard of *Bill Johnson's* "squarely applies" in this case and that *Professional Real Estate Investors* did not alter this standard. *Id.* at 43a-44a (citing *Diamond Walnut Growers, Inc.* v. *NLRB*, 53 F.3d 1085 (9th Cir. 1995)). Therefore, the fact that all of petitioner's claims were rejected by the district court on the merits, or were voluntarily withdrawn with prejudice, established that petitioner's federal suit was "unmeritorious within

the meaning of *Bill Johnson's*." *Id.* at 47a; see *id.* at 46a-49a.

The Board next turned to the requirement of a retaliatory motive. Pet. App. 59a-61a; see *Bill Johnson's*, 461 U.S. at 747. A retaliatory motive could be inferred in this case, the Board held, from the fact that petitioner's federal suit was "by its terms" directed at the same union lobbying, suit-filing, and grievance-filing that the Board had found was protected under Section 7. Pet. App. 59a. Because petitioner admitted that its suit "was aimed directly at protected activity," and because the suit "necessarily tended to discourage similar protected activity," the Board held that petitioner's suit was retaliatory for purposes of applying *Bill Johnson's*. *Id.* at 59a-60a. The Board also noted petitioner's attempt to have the district court impose liability for filing the *Pile Drivers* suit on unions that were not parties to the *Pile Drivers* litigation. That aspect of petitioner's suit, the Board held, indicated that petitioner "was interested only in harassing the Unions, not in obtaining justice." *Id.* at 60a. Finally, the Board concluded that petitioner's claims under Section 303 of the Labor-Management Relations Act suffered from an "utter absence of merit," which also supported a finding of retaliatory motive under *Bill Johnson's*. Pet. App. 60a-61a (citing 461 U.S. at 747).

To remedy petitioner's unfair labor practice, the Board entered an order directing petitioner to cease and desist from engaging in the conduct found unlawful, directed petitioner to post a notice to its employees, and ordered petitioner to reimburse the unions for expenses they had incurred in defending against the federal lawsuit that constituted the unfair labor practice. Pet. App. 65a-68a. The Board noted (*id.* at 63a) that *Bill Johnson's* explicitly authorized an award of attorneys'

fees and expenses against an employer in this context. See 461 U.S. at 747. The Board also rejected (Pet. App. 64a-65a) petitioner's contention that, notwithstanding the language of *Bill Johnson's*, the Board's authority to award attorneys' fees and litigation expenses is limited to cases in which the violator of Section 8(a)(1) engaged in "frivolous" litigation. The Board explained (*id.* at 64a-65a) that it was awarding attorneys' fees to remedy the unfair labor practice it had identified, and that the Board has authority to award make-whole relief for employers' unfair labor practices. See generally 29 U.S.C. 160(c).

5. The United States Court of Appeals for the Sixth Circuit denied a petition for review filed by petitioner and enforced the Board's order. Pet. App. 1a-25a. As is relevant here, the court of appeals agreed with the Board that *Bill Johnson's* provides the analytic framework for this case. The court rejected petitioner's argument that *Professional Real Estate Investors* required the Board to determine whether petitioner's completed suit was "baseless." *Id.* at 18a-19a. The court explained that *Professional Real Estate Investors* addressed the sham-litigation exception to *Noerr* antitrust immunity, not the circumstances under which the Board may find an unfair labor practice. *Ibid.* The court of appeals further observed that, although the *Professional Real Estate Investors* Court supported its antitrust holding with an analogy to *Bill Johnson's*, this analogy was to the standards stated in *Bill Johnson's* for enjoining ongoing litigation, not the standards for finding an unfair labor practice after a decision has been rendered in the court case that is the alleged unfair labor practice. *Id.* at 19a; see 508 U.S. at 59. The court of appeals thus found *Professional Real Estate Investors* "totally inapplicable" to this case. Pet. App. 19a.

Applying *Bill Johnson's*, the court of appeals upheld the Board's finding that petitioner's federal suit lacked merit. Like the Board, the court of appeals concluded that the suit's lack of merit was established by both the federal district court's dismissal orders (which the Ninth Circuit upheld) and petitioner's voluntary withdrawal of its other claims. See Pet. App. 17a-18a. The court of appeals also upheld the Board's finding that petitioner filed its suit with a retaliatory motive. *Id.* at 20a-22a. The court found (*ibid.*) that the demonstrated lack of merit to petitioner's federal suit; petitioner's repetitive filing of amended complaints that re-alleged claims on which the district court had already ruled; petitioner's pursuit of antitrust treble damages as a punitive sanction for the unions' protected Section 7 activities; and petitioner's attempts to obtain damages from unions that (as petitioner knew or should have known) were not parties to the *Pile Drivers* action, collectively supported the Board's finding of a retaliatory motive.

Finally, the court of appeals upheld the Board's award of attorneys' fees to the unions. Pet. App. 22a-25a. The court found that the award was an appropriate exercise of the Board's remedial authority because it helped to return the injured unions "to the financial positions they occupied prior to the filing of [petitioner's] unmerited, retaliatory suit." *Id.* at 24a.

SUMMARY OF ARGUMENT

1. By filing a lawsuit in retaliation for the exercise of rights protected by Section 7 of the Act, 29 U.S.C. 157, an employer or labor union may be able to impose substantial litigation costs on the employee-defendants and discourage other employees from undertaking similar protected activities. The NLRA broadly prohibits

practices that restrain, coerce, or interfere with the exercise of protected employee rights and, accordingly, the Board has determined in a number of contexts that such retaliatory lawsuits are unfair labor practices.

In *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983), this Court rejected the Board's view that it could find an unfair labor practice based solely on the plaintiff's retaliatory motive in filing the suit. The Court held in light of First Amendment and federalism concerns that, in order to find that completed, retaliatory state-court litigation constitutes an unfair labor practice, the Board must find that the judgment went against the plaintiff, that the plaintiff withdrew the suit, or that the suit was otherwise shown to be without merit. That rule governed further proceedings in the case and was not dictum. Nor did *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), overrule *Bill Johnson's*. The question of how to apply the NLRA in the context of retaliatory litigation was not before the Court in *Professional Real Estate Investors*. Congress, moreover, has impliedly accepted the holding of *Bill Johnson's* by failing, over the course of nearly two decades, to supersede that holding through new legislation. For all those reasons, *stare decisis* principles weigh heavily against petitioner's call to overrule *Bill Johnson's*.

2. Petitioner errs in reading cases such as *Professional Real Estate Investors* and *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978), as establishing a bright-line constitutional rule. In those cases, this Court interpreted particular statutes in light of their language, history, and purposes. To the extent that the Court considered the First Amendment, it never stated or suggested a rule that the government may not pro-

vide for make-whole relief against a party who files and prosecutes an ill-motivated lawsuit unless the lawsuit is objectively baseless. Indeed, the inflexible First Amendment rule that petitioner urges this Court to adopt would cast doubt on the validity of many long-accepted provisions of federal and state law, including Rule 11(b)(1) of the Federal Rules of Civil Procedure, the common-law tort of abuse of process, and the federal courts' exercise of their inherent authority to assess attorneys' fees against parties who prosecute lawsuits in bad faith. The logic of petitioner's position also would unwarrantedly constitutionalize the American Rule that a prevailing litigant ordinarily is not entitled to collect attorneys' fees from the loser. See generally *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240 (1975).

3. There is no inconsistency between the rule that the Board and the court of appeals applied in this case (that the Board may find that a losing, retaliatory lawsuit was an unfair labor practice and order the plaintiff to compensate the defendant for its costs of defending against the suit) and the further rule, also stated in *Bill Johnson's*, that the Board may not enjoin the prosecution of an ongoing, retaliatory state-court lawsuit as an unfair labor practice unless the lawsuit is baseless. In the first place, an award of attorneys' fees against a plaintiff after the judgment in the underlying litigation is a less severe remedy than enjoining prosecution of an ongoing lawsuit. It also is black-letter law that the possibility of subsequent civil or criminal proceedings generally is less problematic than an injunction against the exercise of First Amendment rights. *Bill Johnson's*, moreover, allows litigants who file non-frivolous suits to proceed to discovery, through which they may obtain sufficient evidence to win their case and thereby

insulate themselves from liability for committing an unfair labor practice—even though they may have filed their suit with a retaliatory motive.

It also is relevant that petitioner brought its suit against the unions in federal court, not state court. When holding in *Bill Johnson's* that the Board may not *enjoin* an ongoing, retaliatory lawsuit unless it is baseless, this Court relied heavily on federalism concerns and the States' interest in providing a judicial forum for the peaceful resolution of disputes. Those concerns have no place in this case. Thus, there is less in this case to counterbalance the public interest in protecting employees' Section 7 rights, and even less reason than in *Bill Johnson's* to require the Board to find, before enforcing the Act against a losing plaintiff who acted with a retaliatory motive, that the unsuccessful litigation was baseless.

4. The rules stated in *Professional Real Estate Investors* and *Bill Johnson's* reflect the statutory schemes that were at issue in these cases. In *Professional Real Estate Investors*, the possibility of an antitrust counterclaim was likely to weigh heavily on a potential plaintiff. The antitrust laws authorize private enforcement; private antitrust actions are particularly expensive and time-consuming to defend against; and the treble-damages remedy provides a strong disincentive to initiating litigation that could trigger an antitrust claim. By contrast, the NLRA generally is enforced only by the Board, not in suits between private parties. If the Board does issue a complaint, its procedural rules minimize the costs of defending against the enforcement action. And even if the Board finds an unfair labor practice, it lacks authority to impose exemplary damages such as the antitrust treble-damages remedy. For all those reasons, *Bill Johnson's* suffi-

ciently protects First Amendment petitioning rights in the NLRA context and there is no need to provide the same immunity for losing, non-frivolous lawsuits that *Professional Real Estate Investors* provides in the antitrust context.

The Board's requirement of a retaliatory motive further safeguards the First Amendment rights of potential plaintiffs in the NLRA context. The Board gives weight, when applying its motive requirement, to factors including whether the completed lawsuit, although unsuccessful, had a legal and factual basis. Under the Board's precedents, a potential plaintiff who litigates in good faith rather than to deter employees from exercising their protected rights has little reason to fear that he will be held liable for committing an unfair labor practice.

ARGUMENT

THE BOARD MAY FIND AN UNFAIR LABOR PRACTICE AND IMPOSE A MAKE-WHOLE REMEDY WHEN AN EMPLOYER PROSECUTES, WITH A RETALIATORY MOTIVE, A LOSING LAWSUIT AGAINST EMPLOYEES, EVEN IF THE SUIT WAS NOT "OBJECTIVELY BASELESS"

In *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983), this Court limited the protections afforded to employees under the NLRA in order to accommodate an employer's First Amendment right to petition the government by filing a state-court suit. The Court succinctly stated the rule that resulted from its balance of statutory and constitutional commands: "[A]lthough it is an unfair labor practice to prosecute an unmeritorious lawsuit for a retaliatory purpose, the offense is not enjoinable unless the suit lacks a reason-

able basis." *Id.* at 749. The Board has applied that rule for nearly two decades.

The rule of *Bill Johnson's* is consistent with the First Amendment and with this Court's discussion of antitrust immunity in *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993). The rule also has proved workable in practice and it is supported by *stare decisis*, as well as by principles of statutory construction and administrative law. The rule stated in *Bill Johnson's* should not be disturbed.

A. The Court's Decision in *Bill Johnson's* Is Entitled To Repose

1. As the Court recognized in *Bill Johnson's*, Section 8(a)(1) of the NLRA is a "broad, remedial provision" that Congress enacted to "guarantee that employees will be able to enjoy their rights protected by § 7—including the right to unionize [and] the right to engage in concerted activity for mutual aid and protection * * *—without fear of restraint, coercion, discrimination, or interference from their employer." 461 U.S. at 740. Discharging employees who join or assist unions is one method of discouraging workers from exercising their Section 7 rights, and a classic unfair labor practice. See, *e.g.*, *NLRB* v. *Transportation Mgmt. Corp.*, 462 U.S. 393 (1983); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 47-48 (1937). So too, a lawsuit "may be used by an employer as a powerful instrument of coercion or retaliation." *Bill Johnson's*, 461 U.S. at 740. By filing a lawsuit against employees who engage in protected Section 7 activity, an employer can force the employee-defendants to retain counsel and to incur substantial legal expenses. *Id.* at 740-741. The suit is likely to put considerable pressure on the employee-

defendants to cease the challenged activity, even though it is protected by the NLRA. The suit also may discourage protected activity by other employees, who have been put on notice that they risk a similar suit. If an employer files a civil suit in response to an employee's filing of unfair labor practice charges with the Board, other employees may be discouraged from invoking the Board's process or cooperating with Board investigations. When the employer seeks monetary damages in addition to injunctive relief, as in this case, the suit's "chilling effect" on protected Section 7 activity is multiplied. *Id.* at 741.

The Board's decisions illustrate a number of recurring situations in which a lawsuit—whether filed by an employer or a labor union—may have the purpose and effect of deterring the exercise of rights protected by the NLRA. An employer or union may file a lawsuit to retaliate against employees for filing charges with the Board or for engaging in other activity protected by the NLRA.[3] Unions may sue employees to enforce unlaw-

---

[3] See, *e.g.*, *Bill Johnson's*, 461 U.S. at 733-734; *Sheet Metal Workers' Union, Local 355*, 254 N.L.R.B. 773, 778-780 (1981) (union state-court suit seeking $30,000 in damages from employee who filed charges with Board), enforcement granted in part and denied in part, 716 F.2d 1249 (9th Cir. 1983); *United Credit Bur. of Am., Inc.*, 242 N.L.R.B. 921, 925-926 (1979) (employer state-court fraud suit seeking $10,000 in damages from employee who filed charges with Board), enforced, 643 F.2d 1017 (4th Cir.), cert. denied, 454 U.S. 994 (1981); *George A. Angle*, 242 N.L.R.B. 744, 746-748 (1978) (similar employer suit), enforced, 683 F.2d 1296 (10th Cir. 1982); *Power Sys., Inc.*, 239 N.L.R.B. 445, 446-450 (1978) (similar employer suit), enforcement denied on other grounds, 601 F.2d 936 (7th Cir. 1979); *W.T. Carter & Brother*, 90 N.L.R.B. 2020, 2024 (1950) (employer state-court suit to enjoin the holding of union meetings during organizing campaign), overruled by *Clyde Taylor Corp.*, 127 N.L.R.B. 103 (1960).

ful fines or unlawful union-security agreements.[4] Or a union may sue an employer in pursuit of unlawful objectives.[5]

After grappling with such abusive suits for several decades, see *Bill Johnson's*, 461 U.S. at 737-739 (discussing Board decisions), the Board ultimately concluded that, whether the lawsuit was filed by an employer or a labor organization, "the *only* essential element of a violation is retaliatory motive," that is, a motive to interfere with the exercise of protected rights. *Id.* at 740; see *Power Sys., Inc.*, 239 N.L.R.B. 445, 449-450 (1978), enforcement denied on other grounds, 601 F.2d 936 (7th Cir. 1979). To remedy such a violation of the Act, the Board concluded that the party filing the retaliatory suit should be required to cease and desist from prosecuting it, and to make the sued party whole for legal expenses incurred in defending against the suit. See *Id.*. at 450.

2. In *Bill Johnson's*, this Court rejected the Board's rule that allowed a finding of an unfair labor practice based solely on the plaintiff's retaliatory motive in

[4] See, *e.g.*, *Granite State Joint Bd., Textile Workers Union, Local 1029*, 187 N.L.R.B. 636, 636 (1970) (state-court suit to collect fines from employees who resigned membership and crossed picket line), enforcement denied, 446 F.2d 369 (1st Cir. 1971), rev'd, 409 U.S. 213 (1972); *Booster Lodge No. 405, IAM*, 185 N.L.R.B. 380, 380-382 (1970) (similar union suit), aff'd in part, 459 F.2d 1143 (D.C. Cir. 1972), rev'd *sub nom. NLRB* v. *Boeing Co.*, 412 U.S. 67 (1973); *United Stanford Employees, Local 680*, 232 N.L.R.B. 326, 331 (1977) (state-court suit to enforce overbroad union-security clause), enforced, 601 F.2d 980 (9th Cir. 1979); *Television Wis., Inc.*, 224 N.L.R.B. 722, 722 n.2, 779-780 (1976) (similar union suit).

[5] See *International Org. of Masters, Mates, & Pilots*, 224 N.L.R.B. 1626, 1626 n.2, 1634-1636 (1976) (*in rem* suit and picketing to compel vessel owner to accept union contract and employ union members), enforced, 575 F.2d 896 (D.C. Cir. 1978).

filing a state-court suit, without regard to the merit or outcome of the suit. The court found the Board's approach "untenable" because it was insufficiently sensitive to the plaintiff's First Amendment right to petition the courts for redress, and insufficiently respectful of the States' interest in providing a forum for adjudication of their citizens' claims. 461 U.S. at 743; see pp. 2-3, *supra*.[6]

Those First Amendment and federalism concerns, the Court held, warranted modification of the Board's liability rule and adoption of an interrelated set of rules for applying Section 8(a). *First*, the Court held, "the Board may not halt the prosecution of a state-court lawsuit, regardless of the plaintiff's motive, unless the suit lacks a reasonable basis in fact or law." 461 U.S. at 748; see also *id.* at 744. Thus, "[r]etaliatory motive and lack of reasonable basis are both essential prerequisites to the issuance of a cease-and-desist order against a state suit." *Id.* at 748-749. *Second*, if the Board must allow the suit to proceed in the state court and "the employer's case * * * ultimately proves meritorious and he has judgment against the employees," the employer "should also prevail before the Board, for the filing of a meritorious lawsuit, even for a retaliatory motive, is not an unfair labor practice." *Id.* at 747. But, because the First Amendment and federalism concerns that required limiting the Board's authority to halt an ongoing state-court suit do not apply as strongly when the suit is completed and has resulted in a loss to the plaintiff, the employer need not prevail before the

[6] This Court has construed the NLRA in light of constitutional considerations in other cases as well. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988); *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979).

Board "[i]f judgment goes against the employer in the state court * * * or if his suit is withdrawn or is otherwise shown to be without merit." *Ibid.* In that situation, "the employer has had its day in court, [and] the interest of the State in providing a forum for its citizens has been vindicated." *Ibid.* "If the state proceedings result in a judgment adverse to the plaintiff, the Board may then consider the matter further and, if it is found that the lawsuit was filed with retaliatory intent, the Board may find a violation and order appropriate relief," including reimbursing the employees wrongfully sued for their attorneys' fees and other expenses. *Id.* at 747, 749.[7]

3. Petitioner argues that, insofar as *Bill Johnson's* addressed completed lawsuits, its rule is "dicta" that has been superseded by *Professional Real Estate Investors*. See, *e.g.*, Pet. Br. 16-17, 21, 25-26. Petitioner is mistaken. This Court specifically noted that some claims in the state-court suit at issue in *Bill Johnson's* had been dismissed, and the Court remanded so that the Board could apply the Court's standard for completed litigation to those claims. 461 U.S. at 750 n.15.

[7] Petitioner contends (Br. 20) that the *Bill Johnson's* Court used the terms "unmeritorious" and "without merit" to mean "baseless," rather than "losing." If "unmeritorious" and "baseless" were interchangeable, however, it would have made no sense for the Court to state that, "although it is an unfair labor practice to prosecute an unmeritorious lawsuit for a retaliatory purpose, the offense is not enjoinable unless the suit lacks a reasonable basis." 461 U.S. at 749. *Bill Johnson's* is clear, moreover, that the Board may find that a completed lawsuit is unmeritorious if: (1) "judgment goes against the employer"; (2) his suit is withdrawn; or (3) the suit "is otherwise shown to be without merit." *Id.* at 747. Where there is a judgment adverse to the plaintiff, therefore, no further inquiry into the merit of the suit is needed in order to find the suit unmeritorious for purposes of *Bill Johnson's*.

As the Court explained, "[i]f petitioner's other claims have been finally adjudicated to be lacking in merit, on remand the Board may reinstate its finding that petitioner acted unlawfully by prosecuting these unmeritorious claims if the Board adheres to its previous finding that the suit was filed for a retaliatory purpose." *Ibid.*

Nor did *Professional Real Estate Investors* purport to "overrule[] or supercede[]" (Pet. Br. 25) any part of *Bill Johnson's*. As the court of appeals correctly explained in this case (Pet. App. 18a-19a), the narrow issue before the Court in *Professional Real Estate Investors* was how to "define the 'sham' exception to the doctrine of antitrust immunity first identified in *Eastern Railroad President's Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)." 508 U.S. at 51. The petition for a writ of certiorari in *Professional Real Estate Investors* specifically noted that *Bill Johnson's* was "an interpretation of the labor laws" that "cannot be imported wholesale into an antitrust setting." 91-1043 Pet. at 14. Respondents, although citing *Bill Johnson's* as support for their arguments, agreed that "the precise question in *Bill Johnson's* involved the meaning of the National Labor Relations Act," not *Noerr* antitrust immunity. No. 91-1043 Resp. Br. at 24. The proper application of the NLRA in light of First Amendment concerns therefore was not at issue in *Professional Real Estate Investors*, and the Court did not address this question. Thus, *Professional Real Estate Investors* could not have overruled *Bill Johnson's*. See *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (case in which issue is not "raised in briefs or argument nor discussed in the opinion of the Court" is not "binding precedent on th[e]

point"); *Brecht* v. *Abrahamson*, 507 U.S. 619, 631 (1993) (same).

Far from intimating any disapproval of *Bill Johnson's*, moreover, the *Professional Real Estate Investors* Court pointed to the rule stated in *Bill Johnson's* for enjoining ongoing litigation as a useful "analogy to *Noerr's* sham exception." 508 U.S. at 59. Petitioner suggests (Br. 17) that this reference casts doubt on the completed-litigation rule of *Bill Johnson's*. In fact, however, the Court's limited use of *Bill Johnson's* as an "analogy" confirms that *Professional Real Estate Investors* did not address the correct construction of the NLRA.

Petitioner's reading of *Professional Real Estate Investors* also is inconsistent with principles of deference to administrative decision-making. As explained above, the *Bill Johnson's* Court disagreed with the Board's conclusion that a lawsuit filed with a retaliatory motive could be addressed as an unfair labor practice, regardless of the success or failure of the suit. See 461 U.S. at 739-740. The Court recognized, however, that the Board's interpretation was entitled to judicial deference. *Id.* at 742; see *NLRB* v. *Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 711 (2001) (deferring to Board construction of NLRA that is "reasonable and consistent with the Act"). The Court therefore departed from the Board's rule only to the extent that First Amendment and federalism concerns made the Board's position "untenable" and compelled a rule more protective of state-court litigation. 461 U.S. at 742-743.

Petitioner, however, suggests that *Professional Real Estate Investors* further limited the Board's ability to enforce the NLRA, without ever saying so or explaining why. If the Court had done that—which it did not—then *Professional Real Estate Investors* would

have violated the Court's consistent teaching that "[t]he function of striking [a] balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the * * * Board, subject to limited judicial review."[8] *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 501 (1978) (internal quotation marks omitted). Petitioner's unprincipled reading of *Professional Real Estate Investors* should be rejected.

4. The completed-litigation rule of *Bill Johnson's* therefore was material to the holding of the case and has not been overruled. It accordingly deserves respect under traditional principles of *stare decisis*. Indeed, *stare decisis* principles have "special force" (*Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172 (1989)) in this case because—although the *Bill Johnson's* Court deemed constitutional concerns relevant to construing the NLRA—the case fundamentally involved "interpretation of the Act" (461 U.S. at 743). When the interpretation of a congressional enactment is at issue, Congress can correct, through further legislation, any perceived error in the Court's decisions. *Patterson*, 491 U.S. at 172-173; *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 736 (1977). But if Congress has not acted to alter this Court's understanding of a statute, changes in the Court's interpretation threaten to usurp congressional authority and to discourage Congress from fulfilling its assigned constitutional role.

---

[8] The constitutional overtones of *Professional Real Estate Investors* would not have justified a departure from traditional principles of administrative law in that decision. Cf. *Rust* v. *Sullivan*, 500 U.S. 173, 190-191 (1991) (upholding agency interpretative regulation as reasonable and entitled to deference despite constitutional concerns that had "some force").

See *Neal* v. *United States*, 516 U.S. 284, 296 (1996) ("Were we to alter our statutory interpretations from case to case, Congress would have less reason to exercise its responsibility to correct statutes that are thought to be unwise or unfair.").

In this case, Congress has had nearly 19 years to consider the rules for applying Section 8(a) that were stated in *Bill Johnson's* and, if it disagreed with these rules, to make a legislative response. Congress has not taken any such legislative action. The Court therefore should accord "weight to [Congress's] continued acceptance of" *Bill Johnson's*. *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991).

Nor does petitioner suggest a "special reason," unrelated to the correctness of *Bill Johnson's*, to reopen the Court's construction of the NLRA. *Planned Parenthood* v. *Casey*, 505 U.S. 833, 864 (1992). This emphatically is not a case where the Court's holding "has proven to be intolerable simply in defying practical workability" or has been eclipsed by changes of law or fact. *Id.* at 854-855. Both the Board in exercising its accumulated experience about the workplace (and specifically about the dangers retaliatory lawsuits pose to the exercise of rights protected by the Act),[9] and the courts of appeals in reviewing the Board's decisions,[10]

[9] See, *e.g.*, *Braun Elec. Co.*, 324 N.L.R.B. 1, 2 (1997); *Summitville Tiles, Inc.*, 300 N.L.R.B. 64, 65 & n.6 (1990); *IAM, Dist. Lodge No. 91 (United Technologies Corp.)*, 298 N.L.R.B. 325, 326 (1990), enforced, 934 F.2d 1288 (2d Cir. 1991), cert. denied, 502 U.S. 1091 (1992); *Dahl Fish Co.*, 279 N.L.R.B. 1084, 1111 (1986), enforced, 813 F.2d 1254 (D.C. Cir. 1987).

[10] See Pet. App. 16a-19a; *Petrochem Insulation, Inc.* v. *NLRB*, 240 F.3d 26, 32 (D.C. Cir.), cert. denied, 122 S. Ct. 458 (2001); *Diamond Walnut Growers, Inc.* v. *NLRB*, 53 F.3d 1085, 1088 (9th Cir. 1995); *NLRB* v. *International Union of Operating Eng'rs, Local 520*, 15 F.3d 677, 679 (7th Cir. 1994); *Dash* v. *NLRB*, 793 F.2d 1062, 1070 (9th Cir. 1986). Petitioner suggests (Br. 21-22) that the Second Circuit has "declined to accept" the Board's application of *Bill Johnson's*. In *NLRB* v. *Vanguard Tours, Inc.*, 981 F.2d 62 (1992), the Second Circuit held that, for purposes of applying *Bill Johnson's*, a plaintiff's voluntary withdrawal of a state-court lawsuit does not "signif[y] a determination by the state court that the suit was 'without merit.'" *Id.* at 66. As the court of appeals below explained (Pet. App. 18a n.3), *Vanguard Tours* does not address the situation presented here, where "the majority of a plaintiff's cause of action is dismissed on the merits and only a portion is voluntarily withdrawn." Nor did the *Vanguard Tours* court address voluntarily dismissal of claims *with prejudice*, which has the same effect as a dismissal on the merits. See *id.* at 49a & n.37. The *Vanguard Tours* court, moreover, agreed that where, as here, "the plaintiff has lost on the merits[,] * * * the Board may consider the filing of the suit to have been an unfair labor practice" upon a showing of retaliatory motive. 981 F.2d at 65.

have read *Bill Johnson's* as establishing a separate rule for finding an unfair labor practice based on completed litigation (as distinguished from halting ongoing litigation), and they have had no trouble applying this distinction. Cf. *J.E.M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 122 S. Ct. 593, 605-606 (2001) (relying on absence of any "indication from either Congress or agencies with expertise" that Court's prior decision created unworkable statutory scheme). The most that petitioner can argue (Pet. 22-24) is that some courts of appeals have urged "clarif[ication]" of *Bill Johnson's* in light of *Professional Real Estate Investors*, but that is no more an argument for overturning *Bill Johnson's* than for reaffirming it.

B. *Professional Real Estate Investors* Did Not Establish A "Uniform" Constitutional Rule

Petitioner's central argument for overruling the completed-litigation prong of *Bill Johnson's* is that

Professional Real Estate Investors and other decisions of this Court have stated a "uniform" constitutional rule for when the filing and prosecution of a lawsuit may give rise to statutory liability, which "applie[s] in every imaginable context." Pet. Br. 18, 25. Petitioner badly misreads this Court's cases.

1. *Professional Real Estate Investors* stated a rule of antitrust, not a rule of constitutional law. The Court refined the doctrine of *Noerr*, which is a "doctrine of *antitrust* immunity" (508 U.S. at 51 (emphasis added)) implementing the Sherman Act (see *id.* at 56 (discussing *Noerr*)). As the Court has elsewhere explained, *Noerr* "[i]nterpret[ed] the Sherman Act in the light of the First Amendment's Petition Clause." *FTC* v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 424 (1990). Likewise, although the definition of "sham" litigation set out in *Professional Real Estate Investors* reflected First Amendment concerns, the definition applies specifically to antitrust claims. See 508 U.S. at 60-61.

The *Professional Real Estate* Court noted (and petitioner reiterates, Br. 18) that *Noerr* has been "invok[ed] * * * in other contexts" besides antitrust. 508 U.S. at 59. But the Court also explained that the consistent principle running through those invocations of *Noerr* is "that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham." *Ibid.* (citing *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 424, and *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913-914 (1982)). That narrow principle does not suggest a limitation on the Board's authority to award make-whole relief under the NLRA after determining that a losing lawsuit was brought to interfere with or restrain the exercise of rights protected by Section 7.

2. In its effort to show that *Professional Real Estate Investors* states an inflexible First Amendment rule, petitioner additionally relies (Br. 19-20) on *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978). *Christiansburg*, however, proves the point that the Court's cases in this area turn on interpretation of particular statutes. The question in *Christiansburg* was when a prevailing civil-rights defendant is eligible for an award of attorneys' fees under Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), which provides that "the court, in its discretion, may allow the prevailing party * * * a reasonable attorney's fee." See 434 U.S. at 413-414. After finding the language of Title VII unhelpful, see *id.* at 418, the Court focused on "equitable considerations" (*ibid.*) and legislative history suggesting that Congress "wanted to protect defendants from burdensome litigation having no legal or factual basis" (*id.* at 420). In light of those considerations, the Court held that a losing plaintiff "should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless." *Id.* at 422. The Court added, however, that if a losing plaintiff brought his claim in bad faith, then "there will be an even stronger basis for charging him with the attorney's fees incurred by the defense." *Ibid.*; see also *id.* at 417 & n.9, 419 & n.13.

The holding of *Christiansburg* turned on "the congressional purpose to encourage suits by victims of discrimination while deterring frivolous litigation." *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 762 (1980). Absolutely nothing in *Christiansburg* suggests that the Court perceived a First Amendment prohibition against shifting attorneys' fees to losing plaintiffs

—particularly where (as in the NLRA context) the losing plaintiff filed his suit with a wrongful motive. Indeed, the *Christiansburg* decision does not mention the First Amendment or the constitutional right to petition the courts for redress of grievances.

Nor can it be argued that *Professional Real Estate Investors* gave *Christiansburg* constitutional status. A year after it decided *Professional Real Estate Investors*, the Court once again evaluated the availability of attorneys' fees to a prevailing defendant as a matter of statutory construction (this time in the copyright context). See *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517 (1994). In light of the different statutory context in *Fogerty*, the Court declined to follow *Christiansburg*. *Id.* at 522-525. The Court instead identified some "non-exclusive factors" that courts could consider when deciding whether to award attorneys' fees, including not only "frivolousness" and "objective unreasonableness," but also "motivation" and "the need in particular circumstances to advance considerations of compensation and deterrence." *Id.* at 534 n.19. *Fogerty* thus confirms that there is no constitutional prohibition on assessing attorneys' fees against a losing plaintiff whose lawsuit was not objectively baseless.

3. Petitioner wholly ignores the breath-taking implications of its argument that the "objectively baseless" standard of *Professional Real Estate Investors* is a constitutional rule that applies whenever government would impose liability on a private party for filing and prosecuting a lawsuit. If accepted, petitioner's theory would appear to invalidate numerous federal and state statutory provisions and rules that expressly authorize the imposition of fees on a losing plaintiff without a finding that the plaintiff's suit lacked a reasonable basis.

A provision of federal labor law that is not at issue in this case provides one example. Under Section 7 of the Norris-LaGuardia Act, 29 U.S.C. 107, federal courts lack jurisdiction to issue an injunction "in any case involving or growing out of a labor dispute," unless the court makes findings specified in the statute. That provision further states that "[n]o temporary restraining order or temporary injunction shall be issued" unless the party seeking injunctive relief files "an undertaking with adequate security * * * to recompense those enjoined for any loss * * * caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorneys' fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court." 29 U.S.C. 107. Fees therefore may sometimes be shifted under the Norris-LaGuardia Act to a plaintiff who requests injunctive relief, even if the request was not frivolous. See, *e.g.*, *UAW* v. *LaSalle Mach. Tool, Inc.*, 696 F.2d 452, 459 (6th Cir. 1982); *Elgin, Joliet & Eastern Ry.* v. *Brotherhood of R.R. Trainmen*, 302 F.2d 540, 545 (7th Cir.), cert. denied, 371 U.S. 823 (1962); *Umeko, Inc.* v. *New York Coat, Suit, Dress, Rainwear & Allied Workers Union*, 484 F. Supp. 210, 211 (S.D.N.Y. 1980).

Rule 11 of the Federal Rules of Civil Procedure provides in part that "[b]y presenting to the [federal] court * * * a pleading, written motion, or other paper," the proponent of the document is certifying that, *inter alia*, the document "is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Fed. R. Civ. P. 11(b) and (b)(1). A party who violates Rule 11(b)(1) may be ordered by the court

to pay the opposing party "some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." Fed. R. Civ. P. 11(c)(2). Filing a frivolous claim is separately prohibited by Rule 11(b)(2). Thus, under the plain terms of Rule 11, a complaint filed with "any improper purpose" is sufficient grounds for an attorneys'-fees sanction, whether or not the complaint had a reasonable basis.[11] Indeed, the 1993 advisory committee note to Rule 11(b) and (c) explains that an award of attorneys' fees to the opposing party may be warranted "particularly for (b)(1) violations." See *Clinton* v. *Jones*, 520 U.S. 681, 709 n.42 (1997) (noting that sanctions under Rule 11 may be appropriate "where a claim is 'presented for any improper purpose, such as to harass'"). Like Rule 11, various state laws authorize the imposition of attorneys' fees or other sanctions on a litigant who initiates a lawsuit with an improper purpose, without requiring that the lawsuit also be baseless. See Carol R. Andrews, *Motive Restrictions on Court Access: A First Amendment Challenge*, 61 Ohio St. L.J. 665, 719-723 (2000) (identifying state statutes).

Petitioner's theory likewise would endanger the common-law tort of abuse of process, which the Restatement defines as the "use[] [of] a legal process,

---

[11] Cf. *Lancelotti* v. *Fay*, 909 F.2d 15, 18-19 (1st Cir. 1990) (per Breyer, J.) (1983 version of Rule 11 "ha[d] rather consistently been read by federal appellate courts to reach [pleadings] which, while not devoid of all merit, were filed for some malign purpose"); *Brown* v. *Federation of State Med. Bds.*, 830 F.2d 1429, 1436 (7th Cir. 1987) ("improper purpose" prong of Rule 11 encompasses filing of colorable suit for purpose of imposing expense on defendant); but see *Townsend* v. *Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1990) (en banc) (non-frivolous complaints not subject to Rule 11 sanctions).

whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed." Restatement (Second) of Torts § 682, at 474 (1977). A leading treatise states that the tort of abuse of process "differs from malicious prosecution in that it is not necessary to show that the action in which the process was used was without probable cause or that it terminated favorably to the [tort] plaintiff." Fowler V. Harper, Fleming James Jr. & Oscar S. Gray, *The Law of Torts* § 4.9, at 4:85 (3d ed. 1996) (footnotes omitted); see *Poduska* v. *Ward*, 895 F.2d 854, 855-857 (1st Cir. 1990) (affirming judgment for claimant in abuse-of-process case, where claimant lost in the underlying, abusive litigation). Providing a remedy for that traditional tort therefore would seem to be unconstitutional under petitioner's view of this Court's cases. Cf. *Grip-Pak, Inc.* v. *Illinois Tool Works, Inc.*, 694 F.2d 466, 470 (7th Cir. 1982) (per Posner, J.) ("If all nonmalicious litigation were immunized from government regulation by the First Amendment, the tort of abuse of process would be unconstitutional—something that, so far as we know, no one believes."), cert. denied, 461 U.S. 958 (1983).

Petitioner, moreover, suggests implicitly that federal courts may violate the First Amendment if they exercise what this Court has described as their "inherent power" to "assess attorney's fees when a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 44, 45-46 (1991) (quoting *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 258-259 (1975)). In *Chambers*, this Court indicated that a finding of "bad faith" would be sufficient to exercise that "inherent power" and it did not suggest that the federal court would have to find, in addition, that the litigant acted

without an objective basis. 501 U.S. at 50; see *id.* at 58, 59 (Scalia, J., dissenting) (noting that finding of bad faith is sufficient, but not necessary, to impose sanctions); *id.* at 60, 74 (Kennedy, J., dissenting) (courts may shift fees as a sanction "to the extent necessary to protect the judicial process"); see also *Black's Law Dictionary* 134 (7th ed. 1999) (defining "bad faith" as "[d]ishonesty of belief or purpose").

Taken to its logical extreme, petitioner's position also would give the American Rule—that "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser," *Alyeska Pipeline*, 421 U.S. at 247—constitutional status, at least as applied to a losing plaintiff. That would be a radical departure from historical and legal tradition, for the American Rule has not always been followed in this country, see *id.* at 247-257, and this Court has said emphatically that "the circumstances under which attorneys' fees are to be awarded" is a "matter[] for Congress to determine," *id.* at 262. See *Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 835 (1990) ("[T]he allocation of the costs accruing from litigation is a matter for the legislature, not the courts."). This Court should decline petitioner's invitation to construe *Professional Real Estate Investors* as establishing, *sub silentio*, a new First Amendment rule with such far-reaching consequences. See *Premier Elec. Constr. Co.* v. *National Elec. Contractors Ass'n*, 814 F.2d 358, 373 (7th Cir. 1987) (per Easterbrook, J.) ("Fee shifting * * * is no more a violation of the first amendment than is a requirement that a person who wants to publish a newspaper pay for the ink, the paper, and the press.").

C. The *Bill Johnson's* Court Reasonably Distinguished The Board's Authority To Remedy A Retaliatory Suit After Judgment From The Board's Authority To Enjoin Prosecution Of A Retaliatory Suit

Insofar as petitioner addresses *Bill Johnson's* on its own terms, petitioner argues primarily (Br. 13, 27) that having a different rule for imposing attorneys' fees on a plaintiff who brought a losing lawsuit, as opposed to enjoining the prosecution of ongoing litigation, cannot be consistent with the First Amendment because there is no meaningful First Amendment distinction between the two situations. Petitioner's logic fails on several counts.

1. This Court's cases foreclose petitioner's contention that barring a plaintiff from prosecuting a lawsuit is no different from assessing attorneys' fees on a losing plaintiff. Awarding attorneys' fees, the Court has held in the context of judicial sanctions, is "less severe" than the "particularly severe sanction" of terminating the suit. *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 45 (1991) (quoting *Roadway Express*, 447 U.S. at 765). That is equally true in the context of petitioner's First Amendment claim.

In *Minnesota State Board for Community Colleges* v. *Knight*, 465 U.S. 271 (1984), the Court stressed that, while the First Amendment empowers individuals to "petition openly" and protects them "from retaliation for doing so," the Petition Clause "does not impose any affirmative obligation on the government to listen [or] to respond." *Id.* at 286 (internal quotation marks omitted). Likewise, in the prison context, the "right of access to the courts" recognized by this Court is "a right to bring to court a grievance that the inmate wishe[s] to present." *Lewis* v. *Casey*, 518 U.S. 343, 354

(1996). It follows that when a lawsuit is allowed to proceed to judgment, the plaintiff's protected First Amendment interest—his interest in expressing grievances—is fully vindicated. See Carol R. Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 Ohio St. L.J. 557, 646-647 (1999) (hereinafter *Right of Access*) (Petition Clause protects only the initial filing of a complaint). The employer or union "has had its day in court." *Bill Johnson's*, 461 U.S. at 747. The full prosecution of an action also serves the public interest in being informed of societal problems and in peaceful resolution of disputes, and allows the law to develop, whereas these interests might not be served when the prosecution of a suit is enjoined.

Bedrock First Amendment theory contradicts petitioner's suggestion that imposing liability after the completion of a losing lawsuit should be deemed to have the same "chilling" effect on potential litigants as enjoining prosecution of their suits. The right to petition "is cut from the same cloth as the other guarantees of [the First] Amendment." *McDonald* v. *Smith*, 472 U.S. 479, 482, 485 (1985). Under the Speech Clause and the Press Clause, the Court has recognized a "time-honored distinction * * * between prior restraints and subsequent punishments." *Alexander* v. *United States*, 509 U.S. 544, 553-554 (1993); see *id.* at 560, 566 (Kennedy, J., dissenting). "Behind the distinction," the Court has explained, "is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 559 (1975). A prior restraint therefore "bear[s] a heavy presumption against its constitutional validity," *Bantam Books, Inc.* v.

Sullivan, 372 U.S. 58, 70 (1963), and "[s]ubsequent civil or criminal proceedings, rather than prior restraints, ordinarily are the appropriate sanction for * * * misdeeds in the First Amendment context." *CBS, Inc.* v. *Davis*, 510 U.S. 1315, 1318 (1994) (Blackmun, J., in chambers). Petitioner's theory—that the First Amendment harm of enjoining the prosecution of a lawsuit before judgment is no greater than the First Amendment harm of imposing liability after the plaintiff's speech is complete and the case has been resolved in favor of the defendant—is irreconcilable with those "deeply etched" principles. Cf. *Alexander*, 509 U.S. at 555-558 (application of RICO forfeiture provisions after conviction for obscenity offenses does not impermissibly "chill" exercise of First Amendment right to deal in protected expressive material).[12]

The two-part rule of *Bill Johnson's* also respects the importance of discovery in civil litigation. The simplified notice-pleading authorized by the Federal Rules of Civil Procedure "is made possible by the liberal opportunity for discovery * * * to disclose more precisely the basis of" the plaintiff's claims. *Conley* v. *Gibson*, 355 U.S. 41, 47-48 (1957). Because the Federal Rules do not require a claimant to set out in detail the facts upon which he bases his claim, summary dismissal of a civil case "for failure to set out evidential facts can seldom be justified." *United States* v. *Employing Plasterers*

---

[12] We do not suggest that an injunction against a frivolous and retaliatory lawsuit that violates the NLRA, issued consistent with *Bill Johnson's*, would be a "prior restraint" in the sense condemned by this Court's cases. See *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 764 n.2 (1994); *Lawson* v. *Murray*, 515 U.S. 1110, 1113, 1115 (1995) (Scalia, J., concurring in denial of certiorari). The point, rather, is that petitioner ignores the principles underlying the prior restraint doctrine.

Ass'n, 347 U.S. 186, 189 (1954). Consistent with those principles, *Bill Johnson's* allows a plaintiff who states a non-frivolous cause of action to go forward to discovery, even if the plaintiff does not yet have the proof needed to win the case. If the plaintiff's discovery uncovers evidence that makes out the allegations of the complaint, he need not fear a post-judgment finding of an unfair labor practice. The *Bill Johnson's* rule for completed litigation does, however, discourage the filing of a retaliatory suit that, although not frivolous on its face, is filed without any expectation of locating evidentiary support.

2. Petitioner's argument that the *Bill Johnson's* standard for enjoining litigation should apply as well to finding an unfair labor practice based on a completed, losing lawsuit is especially unfounded in this case, because petitioner's unfair labor practice was the filing of a *federal* lawsuit. When considering the Board's power to enjoin the employer's state-court lawsuit in *Bill Johnson's*, this Court gave great weight to the States' "compelling interest" in maintaining "domestic peace" (461 U.S. at 741) by providing a judicial forum for their citizens. The *Bill Johnson's* Court "was concerned about whether the Board's interpretation of the NLRA would work to pre-empt the *State* from providing civil remedies for conduct touching interests 'deeply rooted in local feeling and responsibility.' 461 U.S., at 741." *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 897 (1984) (internal quotation marks omitted). The *Bill Johnson's* Court therefore explained that, when a judgment has been entered, "the interest of the State in providing a forum for its citizens has been vindicated" and an unfair labor practice can be found even if the lawsuit was not frivolous. 461 U.S. at 747.

In this case, petitioner filed its suit in federal court. Petitioner cannot (and does not) rely on the federalism concerns that largely underlay the ongoing-litigation standard of *Bill Johnson's*. See *Sure-Tan*, 467 U.S. at 898 ("Here, where there is no conflict between the Board's unfair labor practice finding and any asserted state interest, such federalism concerns are simply not at stake."). Therefore, although the Board adheres to the rules set out in *Bill Johnson's* when the lawsuit that is the basis for an allegation of an unfair labor practice was filed in federal court, see Pet. App. 44a n.28, 45a, petitioner is in an especially weak position to claim that the "baseless" standard *Bill Johnson's* established for enjoining state-court litigation should apply to its completed federal lawsuit. If any departure from the two-part rule of *Bill Johnson's* were warranted in a case arising out of federal-court litigation, the reasoning of *Bill Johnson's* would suggest that, because federalism concerns are not present, it might not be necessary for the Board to find that ongoing, retaliatory litigation is "baseless" before enjoining it in that context.

D. The Holdings of *Bill Johnson's* And *Professional Real Estate Investors* Reflect The Different Statutory Schemes At Issue In Those Cases

Just as there is no internal inconsistency in *Bill Johnson's*, the rules stated in that case are consistent with the Court's construction of the antitrust laws in *Professional Real Estate Investors*. Although a losing, retaliatory lawsuit may be remedied as an unfair labor practice under the NLRA without the showing of objective baselessness that would be required in the

antitrust context, this difference is readily explained by differences between the two statutory regimes.[13]

1. Congress has established very different rules for enforcing the antitrust laws and the NLRA. Congress authorized private enforcement of the Sherman Act via suits for damages under Section 4 of the Clayton Act, 15 U.S.C. 15, and for injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. 26. A party who is considering whether to file a lawsuit that might be deemed anticompetitive can expect that, if he does file the suit, the defendant may counter-attack by challenging the suit as an antitrust violation. That threat of antitrust litigation may be daunting.

Pretrial discovery can be burdensome in antitrust litigation. See *Lupia* v. *Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1167 (7th Cir. 1978) (antitrust cases "often encompass a great deal of expensive and time consuming discovery"), cert. denied, 440 U.S. 982 (1979). If an antitrust counter-claim is filed, the plaintiff who initiated the action may become enmeshed "in expensive and burdensome antitrust litigation, which would drag on through the discovery stage at least." *Hydro-Tech Corp.* v. *Sundstrand Corp.*, 673 F.2d 1171, 1177 n.8 (10th Cir. 1982). Although this may deter lawsuits filed for anticompetitive purposes, it may deter other lawsuits as well; a potential plaintiff might "feel pressured

[13] Petitioner argues at length (Br. 29-35) that its federal-court lawsuit in this case was not "objectively baseless." This Court did not grant certiorari on that issue, however. See 122 S. Ct. 803 (Jan. 4, 2002). If the Court concludes that the Board applied the wrong legal test when determining whether petitioner's lawsuit was an unfair labor practice, the Court should remand to the Board for further proceedings under the correct legal standard. See, *e.g.*, *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 295 (1974).

to forego the exercise of its first amendment right to petition the courts." *Ibid.*

Successful antitrust plaintiffs, moreover, can recover treble damages as well as attorneys' fees from the antitrust violator. See 15 U.S.C. 15(a). The magnitude of antitrust liability creates an additional deterrent to filing a lawsuit (well-founded or not) that may lead to antitrust counter-claims. See *Hydro-Tech*, 673 F.2d at 1177 n.8 ("When the discovery burdens of antitrust cases are combined with the threat of treble damages, the prospect of an antitrust action can become a most potent weapon to deter" a would-be plaintiff from filing suit); *Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Exec. Bd.*, 542 F.2d 1076, 1082 (9th Cir. 1976) ("Particularly in antitrust litigation, the long drawn out process of discovery can be both harassing and expensive. When this well known fact is combined with the large damages usually claimed * * * and sometimes awarded, an action like this one can be, from the very beginning, a most potent weapon to deter the exercise of First Amendment rights."), cert. denied, 430 U.S. 940 (1977).

Absent relatively generous immunity against an antitrust counter-claim—such as the "objectively baseless" test of *Professional Real Estate Investors*—the potential plaintiff may decide against bringing a well-founded suit (as well as an anticompetitive one) simply because the filing might trigger related antitrust litigation. Construing the antitrust laws as providing a generous safe harbor such as the "objectively baseless" test thus balances the risk of anticompetive lawsuits against the chilling effect that the treble-damages remedy and other distinct features of antitrust litigation may have on First Amendment petitioning activity. Cf. *Blue Chip Stamps* v. *Manor Drug Stores*, 421

U.S. 723, 742-743 (1975) ("threat of extensive discovery and disruption of normal business activities" weigh in favor of rule that only actual purchasers or sellers of securities may sue for damages under Section 10(b) of Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and SEC Rule 10b-5, 17 C.F.R. 240.10b-5).

Bill Johnson's struck a different balance, which reflects differences between the NLRA and the antitrust laws. Unlike the antitrust laws, the NLRA generally cannot be enforced in suits between private parties.[14] Parties file their unfair labor practice charges with the Board, and the Board's General Counsel has ultimate authority for authorizing the issuance of an administrative complaint upon such a charge. See 29 U.S.C. 153(d); *NLRB* v. *United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 118-119 (1987). A party who is considering filing a lawsuit that he believes to be lawful under the NLRA therefore knows that the defendant cannot unilaterally counter-attack by claiming, without good cause, that the suit is an unfair labor practice. Rather, the Board's General Counsel will dismiss a charge filed by the defendant in the underlying lawsuit if, after an investigation, the General Counsel determines that there has been no violation of the Act or that the evidence is insufficient to substantiate the charge. 29 C.F.R. 101.5, 101.6; see, *e.g.*, *Paragon Gen. Contractors & Cabinetmakers, Inc.*, No. 32-CA-18569-1, 2001 WL 1155402 (NLRB G.C. June 22, 2001); *Wal-Mart Stores, Inc.*, No. 4-CA-28666, 2001 WL 1155418 (NLRB G.C. Apr. 23, 2001); *Wheat Mont. Bakery*, No. 19-CA-26575, 1999 WL 1319219 (NLRB

[14] The limited exception is that a private party may bring a damages action against a labor organization that violates Section 8(b)(4) of the Act, 29 U.S.C. 158(b)(4). See 29 U.S.C. 187.

G.C. Oct. 19, 1999); *Omni Elec., Inc.*, No. 8-CA-23905, 1991 WL 322617 (NLRB G.C. Dec. 16, 1991); see also James D. Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr*, 74 Geo. L.J. 65, 105 (1985) (arguing that, because only the Board can find an unsuccessful lawsuit to be an unfair labor practice, "[t]he resulting inhibition [on filing the lawsuit] * * * is far less chilling than the prospect of facing a private treble-damage suit" under the antitrust laws).

Even if the Board does issue a complaint, the costs of defending against the complaint predictably will be lower than the costs of defending against a private antitrust action. In recognition of "the cost and inconvenience [of] full discovery," the Board's rules do not provide for discovery comparable to that allowed under the Federal Rules of Civil Procedure. *P.S.C. Res., Inc.* v. *NLRB*, 576 F.2d 380, 386 (1st Cir. 1978). The Board permits "little prehearing discovery" after the issuance of a complaint by the General Counsel, *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978), and that which is allowed is solely for the purpose of obtaining and preserving evidence for trial. See *Title Guarantee Co.* v. *NLRB*, 534 F.2d 484, 487 (2d Cir.), cert. denied, 429 U.S. 834 (1976); 29 C.F.R. 102.30-102.31; *David R. Webb Co.*, 311 N.L.R.B. 1135 (1993).

Also in contrast to antitrust litigation, the Board lacks authority to order exemplary damages as a remedy for an unfair labor practice. See 29 U.S.C. 160(c); *Republic Steel Corp.* v. *NLRB*, 311 U.S. 7, 10-12 (1940). Nor may the Board award full, tort-like compensatory or consequential damages for injury caused by an unfair labor practice. See *Farmer* v. *United Bhd. of Carpenters, Local 25*, 430 U.S. 290, 304 (1977) (Board may not award damages for pain, suffering, or medical

expenses); *UAW* v. *Russell*, 356 U.S. 634, 643 (1958). Rather, the Board is authorized only to issue remedies that restore, insofar as possible, the status quo that existed before the unfair labor practice. See *Republic Steel Corp.*, 311 U.S. at 12-13; see also *NLRB* v. *J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941). In a case such as the instant one the Board restores the status quo by awarding the wrongfully sued party its attorneys' fees (but no other economic damages) upon a finding that a civil lawsuit constituted a violation of the Act.[15] See, *e.g.*, *Petrochem Insulation, Inc.* v. *NLRB*, 240 F.3d 26, 34-35 (D.C. Cir.), cert. denied, 122 S. Ct. 458 (2001); *Geske & Sons, Inc.* v. *NLRB*, 103 F.3d 1366, 1378-1379 (7th Cir.), cert. denied, 522 U.S. 808 (1997); see also *Bill Johnson's*, 461 U.S. at 747. Thus, under the NLRA there is no remedy with the same potential "chilling" power as the antitrust remedy of treble damages (plus attorneys' fees).

For all those reasons, the First Amendment petitioning right is protected in the NLRA context without the same immunity for non-frivolous but losing suits that *Professional Real Estate Investors* provides in the antitrust context. It is sufficient in the NLRA context that a potential plaintiff who files a suit with a retaliatory motive will have an opportunity to litigate the case to judgment if the suit is not baseless, and cannot be subjected to liability under the NLRA if the suit

[15] "The Court has repeatedly interpreted [the NLRA] as vesting in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review." *Sure-Tan*, 467 U.S. at 898-899.

succeeds on the merits. See *Bill Johnson's*, 461 U.S. at 747.[16]

The policies underlying the NLRA, moreover, would be significantly compromised if the Board could not enforce Section 8(a) of the Act against employers or unions that, in retaliating against protected Section 7 activity, frame a non-frivolous (although unsuccessful) lawsuit. See *Bill Johnson's*, 461 U.S. at 740-741, 747, 749; see also pp. 18-20, *supra*. The threat that a retaliatory lawsuit poses to employees' statutory rights is not diminished merely because the suit was colorable. Indeed, a rule that colorability suffices to insulate a losing, retaliatory suit from NLRA liability would convey an especially chilling message to employees. By framing a non-frivolous legal claim, an employer or union could render the Board powerless to take remedial action even after the plaintiff has had its day in court and the retaliatory suit has failed on the merits. In that situation, the Board's powerlessness to award a make-whole remedy to the parties who defeated the retaliatory lawsuit would compound the coercive message sent by the retaliatory lawsuit itself. See *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 617 (1969) ("[A]ny

[16] The immunities afforded to plaintiffs under *Bill Johnson's* and *Professional Real Estate Investors* might be analogized to the "breathing space" rules (*NAACP* v. *Button*, 371 U.S. 415, 433 (1963)) established in other First Amendment contexts. See *Right of Access*, at 680. It is a familiar concept that the appropriate amount of "breathing space" around a First Amendment right depends upon the context. Compare *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280 (1964) (establishing "actual malice" test to shield publisher from liability for defamation of public official in matters relating to official conduct), with *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) (rejecting application of *New York Times* rule when allegedly defamed party is private individual).

balancing of [employers' First Amendment rights and employees' Section 7 rights] must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.").

2. The "retaliatory motive" requirement established by the Board and incorporated into the holding of *Bill Johnson's* further ensures consistency between the Board's enforcement of the NLRA and the First Amendment right of petitioning the courts. Contrary to petitioner's implication (see, *e.g.*, Br. 26), an unsuccessful plaintiff cannot be held liable for committing an unfair labor practice just because his suit failed. A losing lawsuit violates Section 8(a) *only* if brought with a motive to interfere with the exercise of protected Section 7 rights. See *Bill Johnson's*, 461 U.S. at 739, 747, 749. Therefore, the *Bill Johnson's* rule does not present a danger that litigants might be "penalized for merely * * * prosecuting a lawsuit." *Chambers*, 501 U.S. at 74 (Kennedy, J., dissenting) (quoting *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 718 (1967)).

As the Board indicated in this case, it would be relevant to the Board's consideration of the plaintiff's motive that a lawsuit, even though ultimately unsuccessful, was not factually or legally baseless. See Pet. App. 61a ("utter absence of merit" to petitioner's claims under the Labor-Management Relations Act, 1947, 29 U.S.C. 187, supported an inference of retaliatory motive); see also *Petrochem Insulation, Inc.* v. *NLRB*, 240 F.3d 26, 32-33 (D.C. Cir.), cert. denied, 122 S. Ct. 458 (2001). The Board also considers a variety of other factors in determining whether a lawsuit was filed in

retaliation for the exercise of protected Section 7 rights. Those factors may include: whether the plaintiff made direct statements indicating anti-union animus, see Pet. App. 60a; *Braun Elec. Co.*, 324 N.L.R.B. 1, 3-4 (1997); whether the plaintiff has a history of hostility to protected union activity, see *Control Servs., Inc.*, 315 N.L.R.B. 431, 456 (1994); whether the plaintiff committed independent, contemporaneous unfair labor practices, see *Summitville Tiles, Inc.*, 300 N.L.R.B. 64, 66 (1990); whether the relief sought in the lawsuit was unreasonably broad, see *IAM, District Lodge No. 91*, 298 N.L.R.B. 325, 326 (1990), enforced, 934 F.2d 1288 (2d Cir. 1991), cert. denied, 502 U.S. 1091 (1992); whether the lawsuit sought punitive damages, see *American Pac. Concrete Pipe Co.*, 292 N.L.R.B. 1261, 1262 (1989); whether the lawsuit was brought against parties whom the plaintiff knew or should have known did not participate in the allegedly unlawful conduct, see Pet. App. 60a; *Diamond Walnut Growers, Inc.*, 312 N.L.R.B. 61, 66 (1993), enforced, 53 F.3d 1085 (9th Cir. 1995); and the timing of the lawsuit in relation to the protected NLRA activity, see *Control Servs.*, *supra*. A plaintiff who litigates in good faith, and not to deter the exercise of protected rights, has little reason to fear that he might be held liable under the NLRA if his suit fails. See, *e.g.*, *Rondout Elec., Inc.*, 329 N.L.R.B. 957 (1999); *Bakery, Confectionery & Tobacco Workers Int'l Union, Local 6*, 320 N.L.R.B. 133 (1995).[17]

---

[17] It should be noted, however, that in other contexts the NLRA sometimes holds both employers and employees accountable when they act, even in good faith, on a belief that later proved erroneous. See, *e.g.*, *NLRB* v. *Burnup & Sims, Inc.*, 379 U.S. 21, 23-24 (1964) ("controlling" consideration in action under Section 8(a)(1) is whether discharges of employees tended "to weaken or destroy" rights protected by Act, not whether employer acted in good faith);

3. Relatedly, amici Society for Human Resource Management and LPA, Inc. are incorrect in suggesting (Br. 28) that the completed-lawsuit standard of *Bill Johnson's* leaves an employer with no legal recourse if it believes a union is engaging in conduct that is unprotected by the NLRA. As explained, the Board could not award a defendant union attorneys' fees merely because the employer went to court and lost. The NLRA, moreover, affirmatively prohibits various forms of union misconduct. See 29 U.S.C. 158(b) and 158(e). If an employer believes itself aggrieved by such unlawful conduct, it may obtain review of the union's activity by filing a charge with the Board. With respect to certain categories of charges filed against a union, moreover, the Act requires the Board's General Counsel to seek interim injunctive relief in federal district court if, after investigation, the General Counsel has "reasonable cause to believe such charge is true and that a complaint should issue." 29 U.S.C. 160(*l*).

Chevron U.S.A., Inc., 244 N.L.R.B. 1081, 1085-1087 (1979) (employer may discipline employees for refusing to cross secondary picket line, whether or not employees were aware that picketing was unlawful).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ARTHUR F. ROSENFELD
General Counsel

LAWRENCE G. WALLACE
Deputy Solicitor General

JOHN E. HIGGINS, JR.
Deputy General Counsel

AUSTIN C. SCHLICK
Assistant to the Solicitor General

JOHN H. FERGUSON
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board

MARCH 2002

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law * * * abridging * * * the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Section 7 of the National Labor Relations Act, 29 U.S.C. 157, provides in pertinent part:

> **Right of employees as to organization, collective bargaining, etc.**
>
> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * * .

3. Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in pertinent part:

> **Unfair labor practices by employer**
>
> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title[.]

* * * * *

4. Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c), provides in pertinent part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter * * * .

Supreme Court, U.S.
FILED
MAR 21 2002
CLERK

(12)

No. 01-518

IN THE

Supreme Court of the United States

BE&K CONSTRUCTION CO.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR UNION RESPONDENTS

PETER D. NUSSBAUM *
MEERA TREHAN
ALTSHULER, BERZON, NUSSBAUM, RUBIN & DEMAIN
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

SANDRA RAE BENSON *
THEODORE FRANK
VAN BOURG, WEINBERG, ROGER & ROSENFELD
180 Grand Avenue, 14th Floor
Oakland, CA 94512-3741
(510) 839-6600

LAURENCE GOLD
BREDHOFF & KAISER, P.L.L.C.
805 Fifteenth Street, N.W.
Suite 1000
Washington, DC 20005

JONATHAN P. HIATT
JAMES B. COPPESS
AMERICAN FEDERATION OF LABOR & CONGRESS OF INDUSTRIAL ORGANIZATIONS
815 Sixteenth Street, N.W.
Washington, DC 20006

* Counsel of Record

(Parties Represented by Above Counsel of Record Listed on Inside Cover)

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

36 pp

Counsel of Record for Respondents International Brotherhood of Electrical Workers, Local 302, AFL-CIO; and Local 342, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO

Counsel of Record for Respondents District Council of Iron Workers of the State of California and Vicinity, International Union of Bridge, Structural and Ornamental Iron Workers, AFL-CIO; Contra Costa County Building and Construction Trades Council, AFL-CIO; Northern California District Council of Laborers, Laborers International Union of North America; Bay Counties District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL-CIO; Local Union No. 378, International Union of Bridge, Structural and Ornamental Iron Workers, AFL-CIO; Cement Masons Union Local No. 825, Operative Plasterers and Cement Masons International Association, AFL-CIO; and Local No. 549, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE COURT OF APPEALS CORRECTLY APPLIED THE RULE ADOPTED IN *BILL JOHNSON'S*	4
II. *PROFESSIONAL REAL ESTATE* DOES NOT CREATE A GENERAL FIRST AMENDMENT STANDARD IMMUNIZING UNMERITORIOUS RETALIATORY LITIGATION FROM THE UNFAIR LABOR PRACTICE PROVISIONS OF THE NLRA	13
A. There Is No First Amendment Right to Bring Unmeritorious Claims to Court for the Purpose of Harassing and Coercing One's Adversary	16
B. The *Professional Real Estate* Definition of Sham Litigation	18
C. Unfair Labor Practice Proceedings Under the NLRA	23
CONCLUSION	29

TABLE OF AUTHORITIES

CASES — Page

American Freightways Co., 124 NLRB 146 (1959) 25
Associated General Contractors v. NLRB, 637 F.2d 556 (8th Cir. 1980) 6
Bakery Workers Local 6 (Stroehman Bakeries), 320 NLRB 133 (1995) 25
Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983) ..... *passim*
Board of Education v. Farmingdale Classroom Teachers Association, 38 N.Y.2d 397, 343 N.E.2d 278 (1975) 16
Briscoe v. LaHue, 460 U.S. 325 (1983) 24
California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 16, 19
Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991) 13, 18, 19
Columbia Pictures v. Professional Real Estate Investors, 944 F.2d 1525 (9th Cir. 1991) 20
Diamond Walnut Growers, Inc. v. NLRB, 53 F.3d 1085 (9th Cir. 1995) 11
Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 3, 14, 18, 19
Farmer v. Carpenters, 430 U.S. 290 (1977) 8
Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994) 29
Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Board of Culinary Workers, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977) 22
Geske & Sons, Inc. v. NLRB, 103 F.3d 1366 (7th Cir. 1997) 28
Golden State Transit Corp. v. Los Angeles, 475 U.S. 608 (1986) 18

TABLE OF AUTHORITIES—Continued

Page

Graves Trucking, Inc. v. NLRB, 692 F.2d 470 (7th Cir. 1982) 28
Hydro-Tech Corp. v. Sundstrand Corp., 673 F.2d 1171 (10th Cir. 1982) 22
Imbler v. Pachtman, 424 U.S. 409 (1976) 24
In re Burlington Northern, Inc., 822 F.2d 518 (5th Cir. 1987) 20
Lambert v. California, 355 U.S. 225 (1957) 13
Local 32B-32J, Service Employees v. NLRB, 68 F.3d 490 (D.C. Cir. 1995) 12, 28
Lupia v. Stella d'Oro Biscuit Co., 586 F.2d 1163 (7th Cir. 1978) 22
Mine Workers v. Pennington, 381 U.S. 657 (1965) 18
Mitchum v. Foster, 407 U.S. 225 (1972) 17
NAACP v. Alabama, 357 U.S. 449 (1958) 17
NAACP v. Button, 371 U.S. 415 (1963) 16
NLRB v. International Union of Operating Engineers, Local 520, 15 F.3d 677 (7th Cir. 1994) 11
NLRB v. United Food & Commercial Workers, 484 U.S. 112 (1987) 24
NLRB v. Vanguard Tours, Inc., 981 F.2d 62 (2d Cir. 1992) 11
Parker v. Brown, 317 U.S. 341 (1943) 18
Peddie Buildings, 203 N.L.R.B. 265 (1973), *enf. denied on other grounds*, 498 F.2d 43 (3d Cir. 1974) 8, 25
Petrochem Insulation, Inc. v. NLRB, 240 F.3d 26 (D.C. Cir. 2001), *cert. denied*, 122 S.Ct. 458 (Oct. 29, 2001) 11, 28
Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962) 23

TABLE OF AUTHORITIES—Continued

	Page
Power Systems, Inc., 239 NLRB 445 (1978), *enf. denied*, 601 F.2d 936 (7th Cir. 1979)	5, 6, 7
Premier Electrical Construction Co. v. N.E.C.A., Inc., 814 F.2d 358 (7th Cir. 1987)	28
Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49 (1993)	*passim*
Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940)	28
Rickards v. Canine Eye Registration Foundation, 783 F.2d 1329 (9th Cir. 1986)	22, 24, 27
Roundout Electric, Inc., 329 N.L.R.B. 957 (1999)	25
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959)	8
Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981)	28
Thomas v. Collins, 323 U.S. 516 (1945)	17
Thornhill v. Alabama, 310 U.S. 88 (1940)	17
Vaca v. Sipes, 386 U.S. 171 (1967)	24
Williams v. NLRB, 105 F.3d 787 (2d Cir. 1996)	27
Wisconsin Department of Industry v. Gould, Inc., 475 U.S. 282 (1986)	18, 28

U.S. CONSTITUTION, STATUTES, REGULATIONS AND RULE

U.S. Const. Amend. I	2, 18
15 U.S.C. § 15(a)	27
29 U.S.C. § 107	29
29 U.S.C. § 158(a)(1)	1, 2, 8, 17, 25
29 U.S.C. § 161(2)	27
29 C.F.R. §§ 102.30 & 102.31	27
29 C.F.R. §§ 102.34-102.39	27
Federal Rule of Civil Procedure 11(b)(1)	16

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS

	Page
F.V. Harper, F. James & O.S. Gray, *The Law of Torts* (3d ed. 1996)	16
NLRB Casehandling Manual §10292.4	27
Omni Electric, Inc., Case No. 8-CA-23905, 1991 WL 322617 (NLRB GC Mem., Dec. 16, 1991)	26
Paragon General Contractors & Cabinetmakers, Inc., Case No. 32-CA-18569-1, 2001 WL 1155402 (NLRB GC Mem., June 22, 2001)	26

BRIEF FOR THE UNION RESPONDENTS

STATEMENT OF THE CASE

The instant unfair labor practice case arises from the filing of a federal court lawsuit by Petitioner BE&K Construction Company against the Respondent Unions for "[t]he purpose of . . . squelch[ing] certain concerted activity in which the unions were engaging on behalf of members." Pet. App. 3a. *See also id.* at 4a-9a (describing the course of that litigation); NLRB Br. in Opp. 3-5 (same).

In response, the Unions filed National Labor Relations Act § 8(a)(1) unfair labor practice charges against BE&K. The Unions' charges were held by the NLRB General Counsel while BE&K pressed its lawsuit and until the district court rendered judgment against the Company and the court of appeals affirmed that judgment. The General Counsel then conducted an investigation into the charges and issued an unfair labor practice complaint against BE&K. Pet. App. 29a. Ruling on the General Counsel's complaint, the National Labor Relations Board found that BE&K had committed a § 8(a)(1) unfair labor practice by "attempt[ing] to retaliate against the unions and their members for engaging in activities protected by federal labor legislation by filing the meritless lawsuit." *Id.* at 10a. To remedy this unfair labor practice, the Board "ordered BE&K to cease and desist from such illegal actions and directed the company to pay the legal fees and expenses incurred by the union defendants in the [retaliatory] litigation." *Id.*

Concluding that the NLRB's decision and order were consistent with this Court's decision in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), the Sixth Circuit enforced the Board's order. Pet. App. 25a.

SUMMARY OF ARGUMENT

I. The Sixth Circuit, in the decision below, correctly understood and properly applied this Court's decision in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983). The language and logic of this Court's decision lead ineluctably to the Sixth Circuit's conclusion that "[t]he law as interpreted by the Supreme Court in *Bill Johnson's* . . . creates a bifurcated system of analysis in determining the protections to be afforded an employer for filing retaliatory lawsuits against employees and unions." Pet. App. 19a.

The Court of Appeals—reflecting the unanimous view of the five circuits that have addressed the meaning of *Bill Johnson's*—described the bifurcated system for analyzing retaliatory litigation unfair labor practice cases as follows:

> "Prior to a court ruling on the merits of the employer's suit, the Board will not find an unfair labor practice unless the underlying lawsuit was without reasonable basis. Following a court determination that the employer's claims are without merit, however, . . . the Board is justified in examining the motives of the employer to determine whether the company unfairly dragged the workers or their representatives into court to further illegal objectives." Pet. App. 19a.

This Court's opinion leaves no room for the Petitioner's argument that *Bill Johnson's* only permits the NLRB to act with regard to losing retaliatory lawsuits that were "objectively baseless."

II. *Professional Real Estate Investors, Inc v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993)—contrary to the argument advanced by the Petitioner in challenging the decision below—does not establish a sweeping First Amendment rule immunizing retaliatory labor dispute litigation that is not objectively baseless and, by so doing, displacing the *Bill Johnson's* rule subjecting losing retaliatory lawsuits to NLRA § 8(a)(1). There is not a word, or a hint, in *Professional Real Estate* that the Court intended to displace *Bill Johnson's*. Nor is there anything in the reasoning of *Professional Real Estate* that calls the balance struck in *Bill Johnson's* into question.

In *Professional Real Estate*, this Court defined the "sham litigation exception" to the antitrust immunity doctrine first identified in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). The *Professional Real Estate* opinion makes clear that it is defining that exception as a matter of antitrust law. The definition of "sham litigation" framed in *Professional Real Estate* is attuned to the specific threats posed by the burdensome nature of antitrust litigation and the treble damages remedy provided by the antitrust laws. The point of the *Professional Real Estate* definition, and its limit, is to ensure that the threat of vexatious sham-litigation antitrust lawsuits does not chill plaintiffs from bringing their legal claims to court. *Professional Real Estate* accomplished this by including in the definition of "sham litigation" an "objectively baseless" component that facilitates the assertion of a *Noerr* immunity defense through a motion for summary judgment.

The enforcement scheme of the NLRA does not create the threat of vexatious litigation against which *Professional Real Estate*'s "objectively baseless" rule guards. In contrast to antitrust litigation, which is brought and controlled by a private party, NLRA unfair labor practice proceedings may be initiated only by the Board's General Counsel, who will issue an unfair labor practice complaint based on "retaliatory litigation" charges only if he is satisfied both that the litigation has been finally adjudicated against the plaintiff *and* that there is sufficient evidence to prove that the lawsuit was brought with a retaliatory motive. Also in contrast to the antitrust enforcement scheme, which provides for treble damages, the monetary relief awarded for a "retaliatory

lawsuit" unfair labor practice is limited to shifting the costs of the unsuccessful retaliatory litigation to the plaintiff who initiated that litigation.

ARGUMENT

The question presented on *certiorari*, as framed by this Court, is whether "the Court of Appeals err[ed] in holding that under *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), the NLRB may impose liability on an employer for filing a losing retaliatory lawsuit, even if the employer could show the suit was not objectively baseless under *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993)."

Our two-fold answer to that question is this: *First*, the Court of Appeals, in enforcing the Board's decision and order, correctly understood, faithfully followed and properly applied *Bill Johnson's*. *See* Part I, *infra*. *Second*, nothing in the First Amendment dictates that the *Bill Johnson's* NLRA "losing retaliatory lawsuit" liability standard must be replaced by the *Professional Real Estate* antitrust law "objectively baseless lawsuit" liability standard. *See* Part II, *infra*.

I. THE COURT OF APPEALS CORRECTLY APPLIED THE RULE ADOPTED IN *BILL JOHNSON'S*

A. The *Bill Johnson's* Court succinctly stated the genesis of that case, its procedural history and the Board's decisional rationale as follows.

The unfair labor practice case at issue arose from the filing of a state court lawsuit by a restaurant owner against several of the restaurant's waitresses. The waitresses had "picketed the restaurant . . . carr[ying] signs asking customers to boycott the restaurant because its management was unfair to the waitresses." 461 U.S. at 733. "In addition, the picketers distributed a leaflet that accused management of making

'[u]nwarranted sexual advances' and maintaining a 'filthy restroom for women employees.' The leaflet also stated that a complaint against the restaurant had been filed by the [National Labor Relations] Board and that [one of the waitresses] had been fired after suggesting that a union be organized." *Id.* at 734.

In response to this activity, the restaurant owner's lawsuit "alleged that the defendants had engaged in mass picketing, harassed customers, blocked public ingress to and egress from the restaurant, and created a threat to public safety" and "also contained a libel count, alleging that the leaflet contained false and outrageous statements published by the defendants with the malicious intent to injure the plaintiffs." 461 U.S. at 734.

One of the defendant waitresses then filed an unfair labor practice charge with the NLRB alleging that the restaurant owner "had filed the civil suit in retaliation for the defendants' protected, concerted activities, and because they had filed charges under the Act." 461 U.S. at 734-735.

The NLRB General Counsel investigated the waitresses' charges and then "issued a complaint . . . alleg[ing] that [the restaurant owner], by filing and prosecuting the state suit, was attempting to retaliate against [the waitresses], in violation of §§ 8(a)(1) and (4) of the National Labor Relations Act." 461 U.S. at 735. And, after a hearing on the merits of the General Counsel's complaint, the Board found that the filing of the state-court lawsuit was an unfair labor practice and ordered the restaurant owner "to *withdraw its state-court complaint* and to reimburse the defendants for all their legal expenses in connection with the suit." *Id.* at 737 (emphasis added).

As the *Bill Johnson's* Court explained, the NLRB in finding an unfair labor practice "applied the rationale of *Power Systems, Inc.*, 239 NLRB 445, 449-450 (1978), *enf. denied*, 601 F.2d 936 (CA 7 1979), in which the Board held

that it is an unfair labor practice for an employer to institute a civil lawsuit for the purpose of penalizing or discouraging its employees from [engaging in protected activity]." 461 U.S. at 736.[1] Under the "*Power Systems* rule . . . an employer or union who sues an employee for a retaliatory motive is guilty of a violation of the Act." *Id.* at 739. And, as the Court also explained, under that rule, "the Board does not regard lack of merit in the employer's suit as an independent element of the . . . unfair labor practice," rather "the *only* essential element of a violation is retaliatory motive." *Id.* at 740 (emphasis in original). On the *Power Systems* view of the law, then, "prosecution of a totally meritorious suit might be deemed by the Board to be an unfair labor practice, if filed for a retaliatory purpose," *id.* at 740 n. 8, with the result that the Board would "issue a cease-and-desist order to halt [the] allegedly retaliatory lawsuit," *id.* at 737.

B. In its opinion, the *Bill Johnson's* Court subjected the NLRB's *Powers System* rule to close scrutiny for its conformity with the Act and with the First Amendment right to petition the government through access to the courts.

The Court began by noting that in purely statutory terms, "the Board's position seems to have substance." 461 U.S. at 740. In this regard, the Court found it pertinent that the NLRA's unfair labor practice provisions "are broad, remedial provisions that guarantee that employees will be able to enjoy their rights secured by § 7 of the Act—including the right to unionize, the right to engage in concerted activity for mutual aid and protection, and the right to utilize the Board's processes—without fear of restraint, coercion, discrimination, or interference from their employer." *Id.* It was also to the point that the Court "has liberally construed these laws as

[1] The *Power Systems* interpretation of the NLRA was developed in a series of unfair labor practice cases filed by employees *against* unions. *See Associated General Contractors v. NLRB*, 637 F.2d 556, 560-562 (8th Cir. 1980).

prohibiting a wide variety of employer conduct that is intended to restrain, or that has the likely effect of restraining, employees in the exercise of protected activities." *Id.*

With respect to the particular type of employer conduct at issue, the *Bill Johnson's* Court recognized that "[a] lawsuit no doubt may be used by an employer as a powerful instrument of coercion or retaliation." 461 U.S. at 740. Elaborating on this point, the Court explained:

> "[B]y suing an employee who files charges with the Board or engages in other protected activities, an employer can place its employees on notice that anyone who engages in such conduct is subjecting himself to the possibility of a burdensome lawsuit. Regardless of how unmeritorious the employer's suit is, the employee will most likely have to retain counsel and incur substantial legal expenses to defend against it. Furthermore, . . . the chilling effect of a state lawsuit upon an employee's willingness to engage in protected activity is multiplied where the complaint seeks damages in addition to injunctive relief." *Id.* at 740-741 (citations omitted).

While the foregoing militated in favor of the Board's *Power Systems* rule, the *Bill Johnson's* Court noted that "[t]here are weighty countervailing considerations . . . that militate against allowing the Board to condemn the filing of a suit as an unfair labor practice and to enjoin its prosecution." 461 U.S. at 741.

The first of these countervailing considerations is "that the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." 461 U.S. at 741. As the Court emphasized, it is necessary to "be sensitive to these First Amendment values in construing the NLRA in the present context." *Id.* In this regard, the Court observed that the NLRB itself had recognized that "[t]he right of access to a court is too important to be called an unfair labor practice solely on the

ground that what is sought in the court is to enjoin employees from exercising a protected right." *Id.*, quoting *Peddie Buildings*, 203 NLRB 265, 272 (1973), *enf. denied on other grounds*, 498 F.2d 43 (3d Cir. 1974).

The second countervailing consideration is "recognition of the States' compelling interest in the maintenance of domestic peace." 461 U.S. at 741. In this regard, the Court "has construed the Act as not pre-empting the States from providing a civil remedy for conduct touching interests 'deeply rooted in local feeling and responsibility,'" and "[i]t has therefore repeatedly been held that an employer has the right to seek local judicial protection from tortious conduct during a labor dispute." *Id.* at 741-742, quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959). For the NLRB "to *enjoin* the prosecution of a well-grounded state lawsuit" would mean that the "state plaintiff subject to such an injunction will be totally deprived of a remedy for an actual injury." 461 U.S. at 742 (emphasis added). "Thus, to the extent the Board asserts the right to declare the filing of a *meritorious* suit to be a violation of the Act, it runs headlong into the basic rationale of . . . [the] cases in which [the Court] declined to infer a congressional intent to ignore the substantial state interest 'in protecting the health and well-being of its citizens.'" *Id.* (emphasis added), quoting *Farmer v. Carpenters*, 430 U.S. 290, 302-303 (1977).

C. Based on these considerations, the *Bill Johnson's* Court modified the NLRB's *Power Systems* rule so as to further assure that "the employer has . . . its day in court" and that "the interest of the State in providing a forum for its citizens has been vindicated." 461 U.S. at 747. In so doing, the Court expressly approved the core principle that "it is an unfair labor practice to prosecute an unmeritorious lawsuit for a retaliatory purpose." *Id.* at 749.

In its essence, *Bill Johnson's* announces four intercommunicated governing propositions for NLRA § 8(a)(1) "retaliatory lawsuit" unfair labor practice cases. The first two propositions govern situations in which the allegedly retaliatory lawsuit has not yet gone to judgment; the second two govern where the lawsuit has gone to judgment:

- First, "[t]he filing and prosecution of *a well-founded lawsuit may not be enjoined* as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act." 461 U.S. at 743 (emphasis added).

- Second, "*baseless litigation is not immunized* by the First Amendment right to petition" and "the state interests . . . do not enter into play when the state-court suit has no basis," because "by definition, the plaintiff in a baseless suit has not suffered a legally protected injury." 461 U.S. at 743 (emphasis added). Therefore, "it *is* an *enjoinable* unfair labor practice to prosecute a *baseless* lawsuit with the intent of retaliating against an employee for the exercise of rights protected by § 7 of the NLRA." *Id.* at 744 (emphasis added).

- Third, "if the employer's case in the state court ultimately proves *meritorious* and he has *judgment against the employees*, the employer should also prevail before the Board, for the filing of a *meritorious* lawsuit, even for a retaliatory motive, is not an unfair labor practice." 461 U.S. at 747 (emphasis added).

- Fourth, "[i]f *judgment goes against the employer* in the state court, however, or if his suit is withdrawn or is otherwise shown to be *without merit*, the employer has had its day in court, the interest of the State in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the . . . unfair labor practice case . . . [by] determining whether the suit had been filed in retaliation for the exercise of the employees' § 7 rights." 461 U.S. at 747 (emphasis added).

The *Bill Johnson's* Court spelled out the lesson of the foregoing propositions—and the distinction between *pending*, allegedly retaliatory lawsuits, and *adjudicated*, allegedly retaliatory lawsuits on which those propositions rest—in the most concrete terms:

> "[T]he Board may not halt the prosecution of a state-court lawsuit, regardless of the plaintiff's motive, unless the suit lacks a reasonable basis in fact or law. * * * [I]f the Board is called upon to determine whether a suit is unlawful prior to the time that the state court renders final judgment, and if the state plaintiff can show that . . . genuine material factual or legal issues exist, the Board must await the results of the state-court adjudication with respect to the merits of the state suit. If the state proceedings result in a judgment adverse to the plaintiff, the Board may then consider the matter further and, if it is found that the lawsuit was filed with retaliatory intent, the Board may find a violation and order appropriate relief. In short, then, *although it is an unfair labor practice to prosecute an unmeritorious lawsuit for a retaliatory purpose, the offense is not enjoinable unless the suit lacks a reasonable basis*." 461 U.S. at 748-749 (emphasis added).

Bringing these instructions to bear on the case before it, the *Bill Johnson's* Court specifically directed that if any of the petitioner-employer's "claims have been finally adjudicated to be lacking in merit, on remand the Board may reinstate its finding that petitioner acted unlawfully by prosecuting these unmeritorious claims if the Board adheres to its previous finding that the suit was filed for a retaliatory purpose." 461 U.S. at 750 n. 15.

D. In sum, the *Bill Johnson's* opinion "makes clear [that] the Board's ability to *enjoin* prosecution of a state suit is not the measure of its ability to determine that such prosecution

constitutes an unfair labor practice." 461 U.S. at 753 (Brennan, J., concurring) (emphasis in original), citing *id.* at 741, 749.

Given the clear language and logic of this Court's opinion, every circuit to have considered a post-judgment retaliatory litigation unfair labor practice case has agreed with the court below that

> "[t]he law as interpreted by the Supreme Court in *Bill Johnson's* . . . creates a bifurcated system of analysis in determining the protections to be afforded an employer for filing retaliatory lawsuits against employees and unions" in which, "[f]ollowing a court determination that the employer's claims are without merit, . . . the Board is justified in examining the motives of the employer to determine whether the company unfairly dragged the workers or their representatives into court to further illegal objectives." Pet. App. 19a.

Accord NLRB v. Vanguard Tours, Inc., 981 F.2d 62, 65 (2d Cir. 1992) ("Once the suit has been adjudicated, however, the standard is less forgiving to persons who have filed a retaliatory suit. If the plaintiff has lost on the merits—even if he had a reasonable basis in bringing suit—the Board may consider the filing of the suit to have been an unfair labor practice."); *Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26, 31-32 (D.C. Cir. 2001), *cert. denied*, 122 S.Ct. 458 (Oct. 29, 2001) (same); *Diamond Walnut Growers, Inc. v. NLRB*, 53 F.3d 1085, 1088 (9th Cir. 1995) (same); *NLRB v. International Union of Operating Engineers, Local 520*, 15 F.3d 677, 679 (7th Cir. 1994) (same).

The *Bill Johnson's* opinion leaves no room for BE&K's argument that the Sixth Circuit—and the District of Columbia, Second, Seventh and Ninth Circuits—have all misunderstood this Court's *Bill Johnson's* rulings.[2] The

---

[2] The Petitioner and its *amici* are on no firmer ground in contending that the *Bill Johnson's* rule is one-sided. The NLRB has shown itself

Petitioner would have it that there is *no* legal distinction between the NLRB's authority to enjoin *pending* retaliatory lawsuits, on the one hand, and the NLRB's authority to remedy *adjudicated* retaliatory lawsuits as unfair labor practices by ordering the lawsuit plaintiff to pay the lawsuit defendants' legal fees and costs, on the other. *See* Pet. Br. 20-21. In both instances, says the Petitioner, the Board may only act against a suit that "lacks a reasonable basis."

But, while the *Bill Johnson's* Court said that "the filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice," the Court also said that, "[i]f judgment goes against the employer, . . . the Board may then proceed to adjudicate the . . . unfair labor practice" by "determining whether the suit had been filed in retaliation for the exercise of the employees' § 7 rights." 461 U.S. at 743 & 747. *See also id.* at 749 ("If the state proceedings result in a judgment adverse to the plaintiff, the Board may then consider the matter further and, if it is found that the lawsuit was filed with retaliatory intent, the Board may find a violation and order appropriate relief.").

The distinction between the Board's authority with regard to "retaliatory lawsuit" unfair labor practice claims before the underlying litigation has gone to judgment and the Board's authority after the underlying litigation has been adjudicated against the plaintiff is central to the *Bill Johnson's* decision and is stressed repeatedly throughout the opinion. The Sixth Circuit's decision enforcing the NLRB's order in this case faithfully adhered to the distinction drawn in *Bill Johnson's*. As the court below observed, BE&K's lawsuit against the

---

ready and able to protect both employers and employees against litigation brought by unions in violation of the NLRA. *See, e.g., Local 32B-32J, Service Employees v. NLRB*, 68 F.3d 490, 493-494 (D.C. Cir. 1995) (awarding attorneys fees to an employer for an arbitration claim brought by a union in violation of NLRA § 8(b)(4)).

Unions ended in judgment against the Company and the Board's finding that the lawsuit was brought with a retaliatory motive is supported by substantial evidence on the record. Pet. App. 19a-20a.

II. *PROFESSIONAL REAL ESTATE* DOES NOT CREATE A GENERAL FIRST AMENDMENT STANDARD IMMUNIZING UNMERITORIOUS RETALIATORY LITIGATION FROM THE UNFAIR LABOR PRACTICE PROVISIONS OF THE NLRA

As we have seen, BE&K does make some effort to bend *Bill Johnson's* to the Company's purposes—an effort that, as just shown, is unavailing. But in the main, BE&K rests on the argument that the decision in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), makes *Bill Johnson's* "a derelict on the waters of the law," *Lambert v. California*, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting). *See* Pet. Br. 25 ("regardless of what confusion might have existed as a result of dicta in *Bill Johnson's*, this Court's decision in *Professional Real Estate* resolved any prior ambiguities").

In this regard, BE&K contends that *Professional Real Estate* declares a "First Amendment standard" that is to be "broadly and uniformly applied in every imaginable context," Pet. Br. 18, *viz.*, a standard providing that "a lawsuit is protected by the First Amendment from statutory liability unless it is 'objectively baseless,'" *id.* at 17.

Professional Real Estate makes no such sweeping claim. To the contrary, *Professional Real Estate* takes care to distinguish between "*applying Noerr* as an antitrust doctrine [and] *invoking* it in other contexts." 508 U.S. at 59 (emphasis added).[3] And, the *Professional Real Estate* Court's stated

---

[3] *See Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 382 (1991) (recognizing that "there may be other remedies" for "wrongful"

purpose was to "define the 'sham' exception to the doctrine of antitrust immunity first identified in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), as that doctrine applies in the litigation context." 508 U.S. at 51.

Consistent with the opinion's focus on *Noerr* immunity as an antitrust law doctrine, *Professional Real Estate*'s definition of the "sham litigation" exception is attuned to the nature of federal court antitrust litigation. In particular, *Professional Real Estate* adopts a definition of the sham exception that is intended to reduce the likelihood that litigants will be chilled from bringing claims to court in good faith because of the prospect that their adversary will retaliate by filing a vexatious treble-damages antitrust lawsuit that will be costly to defend. *Professional Real Estate* does this by providing for a "two-tiered process" for the consideration of "sham litigation" antitrust claims that "requires the plaintiff to disprove the challenged [underlying] lawsuit's *legal* viability before the court will entertain [further] evidence of the suit's *economic* viability [under antitrust standards]." 508 U.S. at 61 (emphasis in original). This permits a "sham litigation" antitrust defendant to assert *Noerr* immunity through summary judgment, thus pretermitting costly discovery and trial litigation on an unsound "sham litigation" claim.

There is not a word, or a hint, in *Professional Real Estate* indicating that its definition of the "sham litigation" exception to *Noerr* antitrust immunity is intended to displace the *Bill Johnson's* NLRA immunity rules derived from the *Noerr* doctrine "by analogy." *Professional Real Estate*, 508 U.S. at 59. Nor is there anything in reason to support the

---

conduct, even where "for [purposes of] the Sherman Act, the *Noerr* exemption applies"). *See also id.* at 384 (remanding for further consideration state-law claims based on conduct that was entitled to *Noerr* antitrust immunity).

extension of *Professional Real Estate* to the NLRA context addressed in *Bill Johnson's*. The *Professional Real Estate* definition is carefully calibrated to provide proper protection—in the context of private treble-damage antitrust litigation—to plaintiffs bringing commercial lawsuits. The *Bill Johnson's* rules, by contrast, are carefully calibrated to provide proper protection—in the context of the public law enforcement procedures and limited "fee-shifting" remedies provided by the NLRA—to plaintiffs who bring labor dispute lawsuits.

In the remainder of this brief, we show that the Petitioner's attempt to read *Professional Real Estate* as announcing a sweeping First Amendment standard that requires revision of the *Bill Johnson's* rules fails utterly. We proceed in three steps.

First, we show that there is no First Amendment right to bring an unmeritorious lawsuit for the purpose of harassing and coercing the defendant, even if the plaintiff can assert an arguable basis in law or fact for the ultimately unsuccessful claim.

Second, we show that *Professional Real Estate* defined the sham exception to *Noerr* as a matter of antitrust law in a manner attuned to the nature of antitrust litigation.

Third, we show that the *Professional Real Estate* definition has no place in the "retaliatory lawsuit" unfair labor practice context because of the cardinal differences between a private "sham litigation" treble-damages antitrust lawsuit and an NLRB General Counsel-initiated "retaliatory lawsuit" unfair labor practice proceeding seeking a "fee-shifting" remedy.

A. There Is No First Amendment Right to Bring Unmeritorious Claims to Court for the Purpose of Harassing and Coercing One's Adversary.

Before turning to a detailed consideration of *Professional Real Estate*, it is important to emphasize at the outset that there is *no* First Amendment right to harass and intimidate one's adversaries by filing an unmeritorious lawsuit.

While the First Amendment "mandates free access to the courts for redress of wrongs," it does not sanction manipulation of the legal process by the filing of unmeritorious claims for purposes of "extortion, blackmail or retribution." *Board of Education v. Farmingdale Classroom Teachers Ass'n*, 38 N.Y.2d 397, 404, 343 N.E. 2d 278, 283 (1975). The courts have erected various rules to safeguard against such "perversion of the legal system" on the ground that "[i]t is an affront to the legal system itself, quite apart from the harm to the injured litigant." 1 F.V. Harper, F. James & O.S. Gray, *The Law of Torts* § 4.9, p. 4:106 (3d ed. 1996). *See, e.g.*, Rule 11(b)(1), Fed.R.Civ.P. (requiring certification that a claim "is not presented for any improper purpose, such as to harass").

"[T]he legislature [likewise] has the power to control" litigation that is being "used as the means or the pretext for achieving 'substantive evils'." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972), quoting *NAACP v. Button*, 371 U.S. 415, 444 (1963). While there is a First Amendment right to bring bona fide legal claims to court, "First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." *California Motor Transport*, 404 U.S. at 514. Once it has been established that "judicial processes have been abused" and that "abuse of those

processes produced an illegal result," the perpetrator of that wrong "cannot acquire immunity by seeking refuge under the umbrella of 'political expression.'" *Id.* at 513.

As this Court observed in *Bill Johnson's*, "[a] lawsuit no doubt may be used by an employer as a powerful instrument of coercion or retaliation" that is likely to have a "chilling effect . . . upon an employee's willingness to engage in protected activity." 461 U.S. at 740, 741. Where an employer-plaintiff brings and prosecutes an unmeritorious lawsuit, thereby causing the employee-defendants to "incur substantial legal expenses to [successfully] defend against it," *id.* at 740-741, nothing in the First Amendment prevents Congress from making that retaliatory lawsuit a § 8(a)(1) unfair labor practice and authorizing the NLRB to alleviate the intentionally inflicted harm by "order[ing] the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses," *id.* at 747. Under this Court's precedents, litigation is not a "constitutionally privileged method of harassing or punishing those who exercise rights protected by §§ 7 and 8 of the NLRA." *Id.* at 755 (Brennan, J., concurring).[4] And, there is nothing in *Professional Real Estate* that suggests to the contrary.

---

[4] Indeed, the employee activities protected from "coercion or retaliation" by *Bill Johnson's*, 461 U.S. at 740, are themselves entitled to First Amendment protection. *See Thomas v. Collins*, 323 U.S. 516, 532 (1945); *Thornhill v. Alabama*, 310 U.S. 88, 102-103 (1940). This protection extends to the employees' "freedom to engage in association for the advancement of [their] beliefs and ideas." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). When "courts [a]re being used to harass and injure individuals" by "those who [a]re bent upon abrogation of [such] federally protected rights," that misuse of the legal system can itself constitute "unconstitutional action." *Mitchum v. Foster*, 407 U.S. 225, 242 & 240 (1972).

B. The *Professional Real Estate* Definition of Sham Litigation.

1. In order to place *Professional Real Estate* in perspective, it is helpful to briefly trace the development of the *Noerr* antitrust immunity doctrine and the sham exception to that immunity.

Noerr antitrust immunity was "developed as a corollary to *Parker* [*v. Brown*, 317 U.S. 341 (1943),]" which "recognized the States' freedom to engage in anticompetitive regulation" notwithstanding the federal antitrust laws. *Columbia v. Omni Outdoor Advertising*, 499 U.S. at 379. *See also id.* at 383 ("*Parker* and *Noerr* are complementary expressions of the principle that the antitrust laws regulate business, not politics").[5] The concern addressed by *Noerr* immunity is that it might be "in derogation of the constitutional right 'to petition the Government for a redress of grievances,' U.S. Const., Amdt. 1, to establish a category of lawful state action that citizens are not permitted to urge." *Id.* at 379.

As a general matter, "[t]hat a private party's political motives are selfish is irrelevant [to the question of antitrust immunity]: '*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.'" *Omni Outdoor Advertising*, 499 U.S. at 380, quoting *Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965). There is, however, a "'sham' exception to *Noerr* encompass[ing] situations in which persons use the govern-

[5] There is no NLRA correlate to the "state action" exception to the federal antitrust laws articulated in *Parker v. Brown*. To the contrary, "in passing the NLRA Congress largely displaced state regulation of industrial relations." *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 286 (1986). *See Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 613-615 (1986). Thus, the NLRA provides a narrower statutory base than the antitrust law for petitioning immunity.

mental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." *Omni Outdoor Advertising*, 499 U.S. at 380 (emphasis in original).

Thus, in *California Motor Transport*, the Court held both that *Noerr* immunity applies to the antitrust litigation context and that the "sham exception" to *Noerr* immunity makes actionable litigation that is instituted "with or without probable cause, and regardless of the merits of the cases" in order to "deprive the [plaintiff's] competitors of meaningful access to the agencies and courts." 404 U.S. at 510 & 512.

But *California Motor Transport* "left unresolved the question . . . whether litigation may be sham merely because a subjective expectation of success does not motivate the litigant." *Professional Real Estate*, 508 U.S. at 57. As a result, "[t]he Courts of Appeals . . . defined 'sham' in inconsistent and contradictory ways." *Id.* at 55.

2. *Professional Real Estate*—which brought this circuit conflict to the Court—arose as follows.

Columbia Pictures sued Professional Real Estate "for alleged copyright infringement," and PRE "counterclaimed, charging Columbia with violations of §§ 1 and 2 of the Sherman Act . . . alleg[ing] that Columbia's copyright action was a mere sham that cloaked underlying acts of monopolization and conspiracy to restrain trade." 508 U.S. at 52. "The parties filed cross-motions for summary judgment on Columbia's copyright claim and postponed further discovery on PRE's antitrust counterclaims." *Id.* After the district court granted summary judgment in PRE's favor on the copyright claim and the court of appeals affirmed this ruling, "Columbia sought summary judgment on PRE's antitrust claims, arguing that the original copyright infringement action was no sham and was therefore entitled to immunity under *Eastern Railroad Presidents Conference v. Noerr Motor Freight*." *Id.*

at 53. The district court granted Columbia's motion on the ground that "there was probable cause for bringing the [copyright] action" and "denied PRE's request for further discovery on Columbia's intent in bringing the copyright action." *Id.*

On appeal, "PRE d[id] not challenge the district court's finding that the infringement action was brought with probable cause, i.e., that the suit was not baseless." *Columbia Pictures v. Professional Real Estate Investors*, 944 F.2d 1525, 1530 (9th Cir. 1991). "Rather, PRE argue[d] that the copyright infringement lawsuit [wa]s a sham because Columbia Pictures did not honestly believe that the infringement claim was meritorious" and that "Columbia Pictures' subjective intent in bringing the suit was a question of fact precluding entry of summary judgment." *Id.* In making this argument, PRE relied upon *In re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir. 1987), which held that "the determinative [sham litigation] inquiry is not whether the suit was won or lost, but whether it was significantly motivated by a *genuine* desire for judicial relief." *Columbia Pictures*, 944 F.2d at 1530, quoting *In re Burlington Northern, Inc.*, 822 F.2d at 528 (emphasis in original).

In rejecting PRE's argument, the Ninth Circuit noted that "[u]nlike the Fifth Circuit, we have held that a suit must be baseless to lose its protection under the *Noerr-Pennington* doctrine." 944 F.2d at 1530. The Ninth Circuit explained its understanding of the "sham exception" as follows:

> "[A]n antitrust plaintiff must make a two-part showing to support a finding of sham: (1) that the suit is baseless—a legal question; and (2) that the suit was brought as part of an anticompetitive plan external to the underlying litigation—a question of fact." *Id.* at 1532 (citation omitted).

3. On *certiorari*, this Court endorsed the view of the Ninth Circuit and rejected that of the Fifth Circuit. *See* 508 U.S. at

55 n. 3. In so doing, the Court "outline[d] a two-part definition of 'sham' litigation," as follows:

> "First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals 'an attempt to interfere *directly* with business relationships of a competitor,' *Noerr*, *supra*, at 144 (emphasis added), through the 'use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon.' *Omni*, 499 U.S., at 380 (emphasis in original)." 508 U.S. at 60-61.

The Court explained that "[t]his two-tiered process requires the plaintiff to disprove the challenged lawsuit's *legal* viability before the court will entertain evidence of the suit's *economic* viability." 508 U.S. at 61 (emphasis in original). And, the Court added that "[w]here, as here, there is no dispute over the predicate facts of the underlying legal proceeding, a court may decide probable cause as a matter of law." *Id.* at 63. "The existence of probable cause eliminate[s] any 'genuine issue as to any material fact,' Fed. Rule Civ. Proc. 56(c), and summary judgment properly [may be] issued." *Id.* at 66.

In holding that "the Court of Appeals properly affirmed summary judgment for Columbia on PRE's antitrust counterclaim," 508 U.S. at 62, this Court cited in particular the portion of the lower court's opinion cautioning that "[b]ecause the sham exception to the *Noerr-Pennington* rule may have a chilling effect on those who seek redress in the

courts, . . . the exception should be applied with caution." *Columbia Pictures*, 944 F.2d at 1531, citing *Rickards v. Canine Eye Registration Foundation*, 783 F.2d 1329, 1334 (9th Cir. 1986) ("The application of the sham exception to single lawsuits may have a chilling effect on those who in good faith seek redress in the courts.").

That caution rests on the recognition that "[w]hen the discovery burdens of antitrust cases are combined with the threat of treble damages, the prospect of defending an antitrust action can become a most potent weapon to deter the exercise of first amendment rights." *Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1177 n. 8 (10th Cir. 1982). Given the threat that "expensive and burdensome antitrust litigation . . . would drag on through the discovery stage at least," it is very much to the point that "'the mere pendency of the action w[ould] chill the exercise of First Amendment rights.'" *Id.*, quoting *Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of Culinary Workers*, 542 F.2d 1076, 1083 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977). That being so, "[t]he ultimate determination, after trial, that an antitrust claim is unfounded, may come too late to guard against the evils that occur along the way." *Lupia v. Stella d'Oro Biscuit Co.*, 586 F.2d 1163, 1167 (7th Cir. 1978).

The two-tiered definition of "sham litigation" adopted by this Court in *Professional Real Estate* is thus responsive to the concern that "antitrust litigation . . . can be, from the very beginning, a most potent weapon to deter the exercise of First Amendment rights." *Franchise Realty*, 542 F.2d at 1082. By allowing summary judgment on grounds of *Noerr* immunity, the *Professional Real Estate* definition erects a "barrier[] to safeguard [First Amendment] guarantees" from "the threat of harassing litigation." *Id.*

The *Professional Real Estate* "sham litigation" definition, then, effectuates Justice Harlan's point that, "having regard

for the special temptations that the statutory private antitrust remedy affords for the institution of vexatious litigation, and the inordinate amount of time that such cases sometimes demand . . ., there is good reason for giving the summary judgment rule its full legitimate sweep in this field." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 478 (1962) (Harlan, J., dissenting). As the *Professional Real Estate* opinion demonstrates, the "objective component" of the sham litigation exception plays an important role in the prompt, summary disposition of an antitrust case on grounds of *Noerr* immunity, by allowing the antitrust court, where "there is no dispute over the predicate facts of the underlying legal proceeding, . . .[to] decide probable cause [in that litigation] as a matter of law." 508 U.S. at 58 & 63.

In sum, *Professional Real Estate* states a rule of antitrust law that is carefully attuned to the context of antitrust litigation. That is both the office of the rule and its natural limits.

C. Unfair Labor Practice Proceedings Under the NLRA.

Private antitrust litigation is critically different from NLRA unfair labor practice proceedings in ways that make the *Professional Real Estate* "objectively baseless" summary judgment rule the proper approach for implementing *Noerr* immunity in the antitrust litigation context and the *Bill Johnson's* unsuccessful-litigation/retaliatory-motivation standard of liability the proper approach for implementing the analogous immunity in the unfair labor practice proceedings context.

First, the antitrust laws are enforced through private lawsuits brought in federal or state court and tried to a judge or a jury; the unfair labor practice provisions of the NLRA, in contrast, are enforced through administrative proceedings brought by a public prosecutor. This Court has recognized that immunity from private litigation does *not* automatically

translate into immunity from public prosecution. *See Briscoe v. LaHue*, 460 U.S. 325, 339 n. 22 & 341 n. 26 (1983) (witnesses enjoy common law immunity from damages for false testimony but not immunity from criminal prosecution for perjury); *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976) ("This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law."). And, as we develop in the first point immediately below, the public law enforcement scheme of the NLRA in itself provides important safeguards for the right of plaintiffs to bring their legal claims to court.

Second, under the antitrust laws, "[t]he threat of treble damages may discourage the filing of meritorious claims, or preclude plaintiffs from asserting novel or cutting-edge theories of liability." *Rickards*, 783 F.2d at 1334. NLRA "retaliatory lawsuit" unfair labor practice proceedings pose no such threat—their remedial point is to shift the costs of the wrongful litigation from the successful defendant to the unsuccessful plaintiff responsible for generating those costs.

1. Under the NLRA, the NLRB General Counsel "has 'final authority' regarding the filing, investigation, and 'prosecution' of unfair labor practice complaints." *NLRB v. United Food & Commercial Workers*, 484 U.S. 112, 124 (1987), quoting 29 U.S.C. § 153(d). *See Vaca v. Sipes*, 386 U.S. 171, 182 (1967) ("the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint"). There is thus no danger of a private litigant initiating vexatious "retaliatory lawsuit" unfair labor practice proceedings for the purpose of imposing litigation costs on the respondent. No proceedings will be initiated unless the NLRB General Counsel finds merit to the charge that unfair labor practices have occurred.

Against that background, the "retaliatory motive . . . element[] of the *Bill Johnson's* unfair labor practice

analysis," Pet. App. 20a, ensures that unfair labor practice proceedings will be initiated only when there is evidence that the unsuccessful litigation was brought for the purpose of harassing and coercing employees in the exercise of NLRA protected rights. In the ordinary NLRA § 8(a)(1) case, an unfair labor practice can be established by showing *either* "employer conduct that is intended to restrain, *or* that has the likely effect of restraining, employees in the exercise of protected activities." *Bill Johnson's*, 461 U.S. at 740 (emphasis added). *See American Frieghtways Co.*, 124 NLRB 146, 147 (1959) ("the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive"). By requiring a snowing of retaliatory motive, the NLRB treats "going to a judicial body for redress of alleged wrongs" differently from "other forms of action directed at . . . employees . . . exercising a protected right." *Id.* at 741, quoting *Peddie Buildings*, 203 NLRB at 272.[6]

The retaliatory motive element of the *Bill Johnson's* unfair labor practice analysis plays an essentially similar role in reducing the risk that plaintiffs will be chilled in exercising their rights to the role played in antitrust litigation by the "objectively baseless" step in the "two-tiered" summary judgment process defined in *Professional Real Estate*. The

---

[6] *See, e.g., Roundout Electric, Inc.*, 329 NLRB 957, 958 (1999) (no unfair labor practice found where state court dismissed the employer's trespass charges against union organizers, because "[g]iven the Respondent's clear toleration of workplace organizing, [the Board could]not conclude that it filed [the] charges to retaliate against protected activity"); *Bakery Workers Local 6 (Stroehman Bakeries)*, 320 NLRB 133, 139 (1995) ("We have carefully considered the record in this case and cannot find that the General Counsel has met his burden of establishing the Respondent's filing of its district court lawsuit was motivated by a desire to retaliate against the exercise of Section 7 rights.").

General Counsel will *not* issue a retaliatory litigation unfair labor practice complaint, unless his investigation establishes that there is sufficient evidence "[o]n the record" generated by his investigation into the unfair labor practice charges to "demonstrate that the Employer's suit had a retaliatory motive." *Paragon General Contractors & Cabinetmakers, Inc.*, Case No. 32-CA-18569-1, 2001 WL 1155402 at *4 (NLRB GC Mem., June 22, 2001). The determination of whether there is sufficient evidence to demonstrate retaliatory motivation is made "in light of the General Counsel's burden of proof." *Id. See also Omni Electric, Inc.*, Case No. 8-CA-23905, 1991 WL 322617 at *4 (NLRB GC Mem., Dec. 16, 1991).[7]

If anything, the General Counsel's unreviewable discretion to refuse to initiate unfair labor practice proceedings provides a greater measure of protection against the threat of vexatious litigation than the "objectively baseless" standard adopted in *Professional Real Estate* for deciding sham litigation claims in the antitrust context. 508 U.S. at 61. This is so, because, even under *Professional Real Estate*, the antitrust plaintiff can initiate a lawsuit by merely alleging an antitrust violation and the defendant bears the burden of moving for summary judgment. Under the post-judgment "retaliatory litigation" standard established in *Bill Johnson's*, by contrast, no unfair labor practice proceeding will even be initiated against the respondent-employer unless the charging party can convince the General Counsel that there is sufficient evidence to

[7] Of course, before issuing a retaliatory litigation complaint, the NLRB General Counsel must also find that the employer's lawsuit tended "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7," 29 U.S.C. § 158(a)(1), and that the lawsuit has come to a conclusion adverse to the employer, *Paragon General Contractors*, 2001 WL 1155402 at *3.

establish that the unsuccessful litigation was conducted for the purpose of retaliating against employees for their exercise of NLRA § 7 rights.

Should the NLRB General Counsel decide to issue a retaliatory lawsuit unfair labor practice complaint, the prosecution of the complaint remains under the control of the General Counsel at all times. *See Williams v. NLRB*, 105 F.3d 787, 790-791 n. 3 (2d Cir. 1996). The General Counsel decides not only whether a complaint shall issue, but "what is and what is not at issue in an unfair labor practice case." *Id.* at 790 n. 3 (brackets and citation omitted). Thus, the charging party is *not* permitted "to introduce evidence to support theories of violations other than the theory relied upon by the General Counsel." *Id.* at 790-791 n.3 (ellipses, brackets and citation omitted). And, the risk of vexatious litigation tactics is reduced even further by the fact that there is no pre-trial discovery in NLRB proceedings. *NLRB Casehandling Manual* § 10292.4.[8]

2. The affirmative "fee-shifting" relief awarded by the NLRB for a retaliatory lawsuit unfair labor practice is limited and stands in stark contrast to the punitive treble damages that are awarded as a matter of right to successful private antitrust plaintiffs. *See* 15 U.S.C. § 15(a).

"The threat of treble damages" is an independent reason that the prospect of defending a sham-litigation antitrust suit "may have a chilling effect on those who in good faith seek redress in the courts." *Rickards*, 783 F.2d at 1334. As this

[8] In unfair labor practice cases, factual inquiries are accomplished by means of NLRB-issued subpoenas requiring the presence of witnesses or documents at the hearing on the merits of the General Counsel's complaint. 29 C.F.R. §§ 102.30 & 102.31. The subpoenas may be enforced only by the General Counsel, acting on behalf of the NLRB; private parties have no enforcement authority. 29 U.S.C. § 161(2). The hearing to which the witnesses are called is administrative in nature and is not a trial before a judge or jury. 29 C.F.R. §§ 102.34-102.39.

Court has observed, "[t]he very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrong-doers." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981).

In the "retaliatory litigation" unfair labor practice context, as this Court noted in *Bill Johnson's*, affirmative relief is limited to an order requiring "the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses," 461 U.S. at 747. *See, e.g., Petrochem Insulation, Inc. v. NLRB*, 240 F.3d at 34-35; *Geske & Sons, Inc., v. NLRB*, 103 F.3d 1366, 1378-79 (7th Cir. 1997); *Local 32B-32J, Service Employees v. NLRB*, 68 F.3d at 493-494. In contrast to the regulatory scheme of the antitrust laws, "[t]he regulatory scheme established for labor relations by the Act is 'essentially remedial,' and the Board is not generally authorized to impose penalties solely for the purpose of deterrence or retribution." *Wisconsin Department of Industry v. Gould*, 475 U.S. at 288 n. 5, quoting *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940).[9]

On any measure, requiring an unsuccessful litigant to bear all of the costs generated by the litigation, including the costs incurred by the prevailing party, cannot be said to interfere with the litigant's First Amendment petitioning rights. "Fee shifting requires the party that creates the costs to bear them," and "the first amendment does not prevent the government from requiring a person to pay the costs incurred in exercising a right." *Premier Electrical Construction Co. v. N.E.C.A., Inc.*, 814 F.2d 358, 373 (7th Cir. 1987). Fee-shifting—even without a showing of bad motive—is common throughout the

[9] Indeed, the Board undertakes to remedy only the *economic* harm caused by unfair labor practices, leaving to the common law courts the task of remedying other sorts of harm such as injury to persons or property. *See, e.g., Graves Trucking, Inc. v. NLRB*, 692 F.2d 470, 475 (7th Cir. 1982).

law. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524-525 & n. 12 (1994) (discussing various fee-shifting statutes).[10] And, the constitutionality of this device has never been seriously called into question.

CONCLUSION

The judgment of the Court of Appeals enforcing the decision and order of the National Labor Relations Board should be affirmed.

Respectfully submitted,

PETER D. NUSSBAUM *
MEERA TREHAN
ALTSHULER, BERZON, NUSSBAUM, RUBIN & DEMAIN
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

SANDRA RAE BENSON *
THEODORE FRANKLIN
VAN BOURG, WEINBERG, ROGER & ROSENFELD
180 Grand Avenue, 14th Floor
Oakland, CA 94512-3741
(510) 839-6600

LAURENCE GOLD
BREDHOFF & KAISER, P.L.L.C.
805 Fifteenth Street, N.W.
Suite 1000
Washington, DC 20005

JONATHAN P. HIATT
JAMES B. COPPESS
AMERICAN FEDERATION OF LABOR & CONGRESS OF INDUSTRIAL ORGANIZATIONS
815 Sixteenth Street, N.W.
Washington, DC 20006

* Counsel of Record

[10] For example, the Norris-LaGuardia Act requires, as a precondition to the issuance of any injunctive relief in a labor dispute, the filing of "an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, *including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied* by the court." 29 U.S.C. § 107 (emphasis added).

Supreme Court, U.S.
FILED
APR 4 2002
CLERK

No. 01-518

IN THE SUPREME COURT OF THE UNITED STATES

BE&K CONSTRUCTION CO.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, et al.

Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONER

Maurice Baskin
Counsel of Record for Petitioner
Venable, LLP
1201 New York Ave., N.W.,
Suite 1000
Washington, D.C. 20005
202-962-4800

April 5, 2002

18 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

SUMMARY OF ARGUMENT.....1

ARGUMENT.....2

I. The Opposing Briefs Have Failed To Reconcile The NLRB's Bifurcated First Amendment Standard With The Holdings of This Court.....2

II. The Post Hoc, Exaggerated Policy Concerns Raised In The Opposing Briefs Are Without Merit And Should Be Rejected.....10

CONCLUSION.....14

TABLE OF AUTHORITIES

Cases

Alexander v. United States, 509 U.S. 544 (1993) 6
Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975). 11
Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983). ..... passim
Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988); 10
Brecht v. Abrahamson, 507 U.S. 619 (1993). 5
California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972). 7
Central Bank of Denver, N.A. v. First Interstate Bank of Denver, 511 U.S. 164 (1994) 5
Central Green Co. v. United States, 531 U.S. 425 (2000). 3, 4
Chamber v. NASCO, Inc., 501 U.S. 32 (1991)..... 12
Christiansburg Garment v. EEOC, 434 U.S. 412 (1978). 6
Clyde Taylor Co., 127 NLRB 103, 109 (1960)..... 13
Granite State Jt. Bd., Textile Workers Union Local 1029 v. NLRB, 409 U.S. 213 (1972) 9
Hoffman Plastic Compounds v. NLRB, 70 U.S.L.W. 4209 (Mar. 27, 2002)..... 9
National Assn. of Govt. Employees, Inc. v. National Federation of Federal Government Employees, 844 F. 2d 216 (5th Cir. 1988 11
NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969).. 13
NLRB v. Yeshiva University, 444 U.S. 672 (1980) 10
Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 4
Payne v. Tennessee, 501 U.S. 808 (1991)..... 5
Phoenix Newspapers, 294 NLRB 47 (1989)..... 8
Professional Real Estate Investors v. Columbia Pictures Industries, Inc., 508 U.S. 49 (1993). ..... passim
Rondout Electric, Inc., 329 NLRB 957 (1999) 8
Southern Steamship Co. v. NLRB, 316 U.S. 31 (1942)..... 1, 9
Sussman v. Bank of Israel, 56 F. 3d 450 (2d Cir. 1994); 11

Townsend v. Holman Consulting Corp., 929 F. 2d 1358 (9th Cir. 1990) 11
U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994) 3, 4

Other

Federal Rule of Civil Procedure 11.....11
Labor Management Relations Act, 29 U.S.C. § 187..... 10
Norris-Laguardia Act, 29 U.S.C. § 107 11
Sherman Act, 15 U.S.C. § 1, ... 10
Prosser and Keeton on Torts § 121 (5th Ed. 1984)..... 12

SUMMARY OF ARGUMENT

The Briefs of the NLRB and the Respondent Unions have failed to justify the Board's Order against BE&K. The ambiguous language in *Bill Johnson's Restaurants*, on which the opposing parties heavily rely, was not essential to the resolution of the contested issue in that case, and was therefore *dicta* which should not be followed. In any event, the NLRB's interpretation of *Bill Johnson's*, if adopted by the Court, would create a glaring inconsistency in the Court's holdings with regard to the definition of the term "meritorious" litigation, which the Court has previously defined and protected under its "objective basis" standard.

The NLRB Brief further ignores or minimizes the sanction of illegality which the Board seeks to impose on BE&K. It is this sanction, and not the mere shifting of attorneys fees, which creates important commonalities for the purpose of First Amendment analysis between the NLRA and the antitrust laws, as the Court has previously recognized. The NLRB Brief confirms that the Board is refusing to accommodate its statutory scheme to the other equally important Congressional objectives expressed in the Sherman Act and the LMRA, in plain violation of this Court's holding in *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942). *See also Hoffman Plastic Compounds, Inc. v. NLRB*, 70 U.S.L.W. 4209, 4211 (Mar. 27, 2002).

Contrary to the Board's exaggerated claims, nothing in BE&K's petition requires the Court to apply the First Amendment in such a way as to interfere with the enforcement of attorney fee shifting statutes, federal court rules or the common law of torts. For the purpose of resolving this case, there is no need for the Court to broadly apply the First Amendment beyond the framework of the antitrust and labor laws, *where the Court has already applied it*. The Court should deny enforcement of the Board's Order.

ARGUMENT

I. The Opposing Briefs Have Failed To Reconcile The NLRB's Bifurcated First Amendment Standard With The Holdings of This Court.

In its Opening Brief, Petitioner BE&K demonstrated that this Court has consistently found "objectively based" litigation to be protected from statutory claims of unlawfulness, under the antitrust laws and in other contexts, including the NLRA. (BE&K Br. at 14-26). BE&K further argued that the NLRB's creation of a bifurcated standard for assessing the legality of litigation under the National Labor Relations Act stems from a misreading of this Court's holding in *Bill Johnson's Restaurants* v. NLRB, 461 U.S. 731 (1983). BE&K showed that the Board's bifurcated standard was both anomalous and unworkable and should be rejected by this Court in favor of the uniform application of the standard articulated in *Professional Real Estate Investors v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993).

In response, the NLRB and the Respondent Unions have attempted to justify the Board's overbroad reading of *Bill Johnson's* and to deflect the compelling rationale of *Professional Real Estate*. Despite all evidence to the contrary, they maintain that the *Bill Johnson's* Court intentionally authorized the Board to sanction meritorious, though unsuccessful, litigation upon its completion, even though that issue was not contested before the Court in *Bill Johnson's* and even though the Court reached the opposite conclusion in *Professional Real Estate* (NLRB Br. at 18-27). The opponents further argue from inconsequential differences between the NLRA and the antitrust laws that a "completed case" exception to First Amendment protections is justified under the NLRA alone. (NLRB Br. at 39-46). Each of these arguments is unavailing and should be rejected by the Court.

At the outset, the opposing briefs rely heavily on language in *Bill Johnson's* relating to completed litigation, which BE&K has previously challenged as *dicta*. (BE&K Br. at 16). According to the NLRB, the "completed case" discussion of *Bill Johnson's* was not *dicta*, because it related to an issue that could be contested before the Board on remand at a later date. (NLRB Br. at 22-27). The NLRB cites no authority for this mistaken proposition.

This Court has defined as *dicta* any discussion in an opinion that is not "essential" to the Court's disposition of the issue actually before it. *Central Green Co. v. United States*, 531 U.S. 425, 431 (2000); *see also U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 23 (1994). In *Bill Johnson's*, the Court identified the issue before it as follows:

> We must decide whether the National Labor Relations Board may issue a cease-and-desist order to halt the prosecution of a state-court civil suit brought by an employer to retaliate against employees for exercising federally-protected labor rights, without also finding that the suit lacks a reasonable basis in fact or law.

461 U.S. at 733.[1] It is undisputed that the *Bill Johnson's* Court answered this question in the negative, after detailed constitutional and statutory analysis. Thus, the "holding" of the Court on the sole issue contested before it was that a "well-founded lawsuit may not be enjoined as an unfair labor practice," in that it is "not unlawful to prosecute a meritorious action" under the NLRA. 461 U.S. at 743.

---

[1] The Petition for Certiorari in *Bill Johnson's* likewise urged the Court only to find that the employer "could not properly be enjoined from maintaining its state-court action." *Id.* at 737.

The Court's later observations in *Bill Johnson's* about the possible future treatment by the NLRB of completed litigation were not "essential" to the contested issue before the Court, and were therefore *dicta*. Any doubt on this point was removed by the Court itself in *Professional Real Estate*, where the Court described the holding of *Bill Johnson's* as being that "even an improperly motivated lawsuit may not be enjoined under the National Labor Relations Act as an unfair labor practice unless such litigation is baseless," while ignoring the *dicta* now relied on by the NLRB. 508 U.S. at 59.[2]

The NLRB Brief fails to address these points. The language of *Bill Johnson's* on which the Board exclusively relies must be treated as *dicta* by the Court. As a result, contrary to the NLRB's Brief, at 25-27, no basis exists for invoking *stare decisis* with respect to the ambiguous "completed case" discussion in *Bill Johnson's*.

This Court has properly invoked the doctrine of *stare decisis* only to support judicial holdings of statutory interpretation which are clear and unequivocal, and which the Court is understandably reluctant to set aside. It is only in that context that the Court has declared the doctrine of stare decisis to have "special force." *See, e.g., Patterson v. McLean Credit Union*, 491 U.S. 164, 175 (1989). By contrast, the Court has repeatedly held that it will not be bound by *dicta*. *Central Green Co. v. United States*, *supra*, 531 U.S. at 431; *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, *supra*, 513 U.S. at 23. The Court has further

[2] "Had the [*Professional Real Estate*] Court believed that the statements in *Bill Johnson's* [regarding completed litigation] had any effect, we would expect that it would have explained why it did not apply them in the case before it. The fact that the Court did not do so indicates that it considered the statements *dicta*." *White v. Lee*, 227 F. 3d 1214, n.18 (9th Cir. 2000), cited in BE&K's Brief, at 23.

disclaimed reliance on prior opinions where the language in question is ambiguous, confusing, or unworkable, particularly as regards constitutional issues. *See Payne v. Tennessee*, 501 U.S. 808, 828 (1991) ("*Stare decisis* is not an inexorable command. Indeed, when governing decisions are unworkable or are badly reasoned this Court has never felt constrained to follow precedent.").[3]

In the present case, the ambiguous *dicta* in *Bill Johnson's* does not bear the weight which the NLRB has put on it. Particularly with regard to the meaning of the term "meritorious litigation," the Court's language is inconsistent, both as to the terminology used elsewhere in the same opinion, and as compared to other decisions of the Court.

Thus, the NLRB Brief asserts that the *Bill Johnson's* Court intended to use the term "without merit" to describe completed litigation which was merely unsuccessful (NLRB Br. at 22), yet the Court elsewhere in the same opinion clearly equated "merit" with "reasonably based" litigation. *See* 461 U.S. at 743. The NLRB Brief offers no explanation as to why "merit" should mean different things on different pages of the opinion. This internal inconsistency within the *Bill Johnson's* opinion (as interpreted by the Board) further undermines the NLRB's reliance on the Court's ambiguous language, *dicta* or not, as support for a statutory sanction

[3] For the same reasons, contrary to the NLRB Brief, at 25, Congressional inaction in the present context offers no guidance to the Court, and certainly is no endorsement of the ambiguous *dicta* of *Bill Johnson's*. *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 U.S. 164, 186 (1994) ("It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the [courts'] statutory interpretation."); *accord Brecht v. Abrahamson*, 507 U.S. 619, 632-33 (1993).

which would conflict with the First Amendment.[4]

The NLRB also has not explained why the Court in *Bill Johnson's* should have adopted a new definition of "meritorious" in part of that case (if it in fact did so), without even acknowledging the contrary definition set forth in *Christiansburg Garment v. EEOC*, 434 U.S. 412, 421-22 (1978). As noted in BE&K's Brief, at 19-20, the Court prior to *Bill Johnson's* defined "meritless" as "unreasonable." Therefore, when the *Bill Johnson's* Court spoke of completed litigation as potentially violating the NLRA if it is "without merit," the Court must be presumed to have been applying the same definition it had previously established in *Christiansburg*.[5]

Again, any doubt on this score was removed by the Court's holding in *Professional Real Estate*. There, the Court not only characterized the *Bill Johnson's* holding as barring a

---

[4] Nothing in the "prior restraint" cases arising under the Speech or Press clauses of the First Amendment, cited in the NLRB Brief at 36-37, supports altering the substantive definition of what constitutes lawful conduct in post-injunction proceedings. *See, e.g., Alexander v. United States*, 509 U.S. 544, 553-54 (1993). Indeed, the cases cited by the NLRB support BE&K's interpretation of *Bill Johnson's* as creating a largely procedural distinction between ongoing and completed litigation. The Court used the same terminology to describe the conduct which the First Amendment would protect, i.e., "meritorious" litigation, whether before or after the litigation is completed.

[5] The NLRB Brief attempts to distinguish *Christiansburg* on the irrelevant ground that the case did not address constitutional issues. (NLRB Br. at 29). BE&K's Brief did not cite *Christiansburg* for the purpose of asserting that its holding was constitutionally based. (BE&K Br. at 19-20). BE&K cited only the indisputable fact that the Court in *Christiansburg* had defined the term "meritless" as "unreasonable and without foundation." That same definition was adopted by the Court in *Professional Real Estate Investors*, and there is simply no reason to believe that the *Bill Johnson's* Court intentionally crafted a new definition applicable exclusively to the NLRA without acknowledging that it was doing so.

finding of illegality as to meritorious (i.e., non-baseless) litigation, but the Court in *Professional Real Estate* itself definitively established that the First Amendment protects litigation from statutory sanction so long as the litigation is not "objectively baseless."

There is no merit to the NLRB's claim that the *Professional Real Estate* holding has no relevance to the NLRA or that a different First Amendment standard should be applied to litigation under the latter statute. (NLRB Br. at 28). This claim has already been refuted by the Court's own repeated cross-referencing between its labor and antitrust cases. As previously noted by BE&K but not explained by the NLRB, the *Bill Johnson's* Court expressly relied on the First Amendment discussion set forth in the antitrust case of *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). In turn, the *Professional Real Estate* Court cited the holding of *Bill Johnson's* with approval in clarifying the applicability of the "objectively baseless" standard to antitrust litigation. Thus, contrary to the argument of the NLRB, this Court has already found that the antitrust laws and the NLRA should be construed *in pari materia* with regard to the Petition Clause of the First Amendment.

In any event, the purported differences between labor and antitrust laws identified by the NLRB and the Unions do not support a different analysis of the First Amendment's Petition Clause as it relates to both statutory schemes. Under both the antitrust laws and the NLRA, unsuccessful plaintiffs may be threatened with a chilling and unknowable risk of being declared to have acted illegally if the statutory prohibitions are held to sanction "objectively based" litigation. Plaintiffs under either law may face considerable expense, discovery and lengthy proceedings (seven years in the present case) if their litigation is challenged as unlawful. Moreover, in both the antitrust and labor settings, the unsuccessful plaintiff is faced with a *statutory sanction* – a

potential declaration that the litigant has violated the law based solely upon the filing of a reasonably based lawsuit – which infringes most directly upon First Amendment rights under both the antitrust and labor laws.

The NLRB Brief dwells on the theoretical "protections" afforded to employers by the Board and its General Counsel, including the additional required element of retaliatory motivation. (NLRB Br. at 42-48). In reality, the NLRB has established a track record since *Bill Johnson's* of automatically finding every unsuccessful employer lawsuit that has come before it to violate the Act, if the suit relates in any way to protected activity. *See, e.g., Phoenix Newspapers*, 294 NLRB 47, n.21 (1989)(Member Cracaft dissenting). *Rondout Electric, Inc.*, 329 NLRB 957 (1999), cited by the NLRB Br. at 47, is the *only* known case since *Bill Johnson's* in which the Board found no violation by an employer plaintiff who had completed unsuccessful litigation against employees (who avoided sanction only by showing that the suit did not relate to protected activity at all).[6]

The NLRB Brief ignores the chilling effect on employers of the Board's statutory sanction and incorrectly attempts to treat this case as a mere "fee shifting" exercise, giving little if any notice to the substance of the Board's Order of *illegality* against BE&K. (NLRB Br. 30). Contrary to the NLRB Brief, fee shifting is not the primary issue here. Rather, the case has reached this Court because the Board has done that which the Court prohibited in both *Bill Johnson's* and *Professional Real Estate, i.e.,* the Board has found

[6] The fact that retaliatory motivation is another required element under *Bill Johnson's* is in any event directly parallel to the *Professional Real Estate* standard and does not in any way obviate the need to prove that the litigation is objectively baseless. *See* 508 U.S. at 60 ("Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation.").

unlawful the filing and maintenance of a suit in court that had an objective basis. Such a finding of illegality has many potential consequences to employers beyond payment of attorneys fees.[7] In any event, finding objectively based litigation to be illegal is inconsistent with the plain language of the First Amendment, under both antitrust and labor laws, and the same standard should apply.[8]

The NLRB Brief also erroneously contends that the Board is entitled to give less deference to federal lawsuits than it did to the state court litigation contested in *Bill Johnson's*. (NLRB Br. at 38). This contention by the Board is unsupportable in light of the Court's decision in *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942). In *Southern Steamship*, referenced in BE&K's Brief at 28 but ignored throughout the NLRB Brief, the Court declared that the NLRB is required to accommodate its statutory scheme to "other equally important Congressional objectives." The Court has quite recently reaffirmed the importance of the *Southern Steamship* doctrine in *Hoffman Plastic Compounds v. NLRB*, 70 U.S.L.W. 4209, 4211 (Mar. 27, 2002).

[7] Among other consequences, a finding of unlawful conduct under the NLRA injures an employer's reputation and goodwill with its customers and employees and may lead to threats of debarment from future work.

[8] In an unsuccessful effort to show "balance" on the part of the Board, the NLRB Brief inappropriately relies on cases in which the Board has found lawsuits filed by unions violative of the Act under the *Bill Johnson's* standard. (NLRB Br. at 20). Nearly all of the cases cited are inapposite, because they arose under footnote 5 of *Bill Johnson's*. In that footnote, the Court declared that the First Amendment offers no protection to any suit which is preempted by the NLRA or which has an "illegal" (as opposed to merely retaliatory) objective. 461 U.S. at 737, n.5, citing *inter alia, Granite State Jt. Bd., Textile Workers Union Local 1029 v. NLRB*, 409 U.S. 213 (1972). Here, BE&K's case was not decided under either of the alternative theories referenced in footnote 5. It is misleading for the Board to rely now on cases decided upon an entirely separate ground from the present case.

Here, BE&K's lawsuit, which the NLRB has declared to be unlawful, was expressly authorized by both the Sherman Act, 15 U.S.C. § 1, and the Labor Management Relations Act, 29 U.S.C. § 187. Contrary to the NLRB Brief, the Board was required by *Southern Steamship* to accommodate these competing statutes by dismissing the allegations of illegality against BE&K in the absence of a finding of objective baselessness. The NLRB's myopic view of its authority, expressed anew in its Brief, is entitled to no deference and must be denied enforcement.

II. The Post Hoc, Exaggerated Policy Concerns Raised In The Opposing Briefs Are Without Merit And Should Be Rejected.

In response to BE&K's request for the Court to apply the common sense "objective basis" standard to completed litigation under the NLRA, the opposing parties have conjured up a parade of "horribles" that would supposedly result from a "rigid" application of the *Professional Real Estate* standard outside the antitrust context. (NLRB Br. at 29-34). The opposing arguments mischaracterize BE&K's contentions and misstate applicable law.

First, it must be noted that none of these arguments was expressed by the NLRB in its Order or Opinion. Therefore, it is improper for such post hoc rationalizations to be put forward now. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988); *NLRB v. Yeshiva University*, 444 U.S. 672, 685, n. 22 (1980) ("The Court will not consider post hoc rationalizations of agency counsel, and will decide the case based solely upon the rational expressed by the challenged agency.").

In any event, the fears expressed by the NLRB's counsel here are wildly overblown. Contrary to the NLRB

Brief, at 30, no "breathtaking implications" arise from the application of the *Professional Real Estate* standard to protect objectively based antitrust litigation from a finding of illegality under the NLRA.

Certainly, adhering to the *Professional Real Estate* standard under the NLRA does not "constitutionalize" (though it is consistent with) the American Rule on attorneys fees. NLRB Br. at 34, citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). Nor does the Court's *Professional Real Estate* standard invalidate any attorneys fee shifting statute. As BE&K has noted above, there is an important distinction between a law that merely shifts fees in litigation versus a statute like the NLRA (as construed by the NLRB) which imposes the sanction of *illegality* on a plaintiff who has pursued litigation with a reasonable basis.[9]

Similarly, nothing in BE&K's Petition calls for the Court to declare Rule 11 of the Federal Rules of Civil Procedure to be in violation of the First Amendment. (NLRB Br. at 31-32). As interpreted by numerous courts, Rule 11 only imposes sanctions upon attorneys who file pleadings for an improper purpose if such pleadings also lack a reasonable basis. (In other words, Rule 11 has already been interpreted in conformance with the *Professional Real Estate Investors* standard.) *See Sussman v. Bank of Israel*, 56 F. 3d 450 (2d Cir. 1994); *National Assn. of Govt. Employees, Inc. v. National Federation of Federal Government Employees*, 844 F. 2d 216, 244 (5th Cir. 1988); *Townsend v. Holman Consulting Corp.*, 929 F. 2d 1358, 1362 (9th Cir. 1990)("A determination of improper purpose must be supported by a

---

[9] For the same reason, contrary to the NLRB Brief at 31, there is no inconsistency between the *Professional Real Estate* standard and the Norris-Laguardia Act, 29 U.S.C. § 107. The latter statute merely shifts fees to an unsuccessful plaintiff, with no attendant finding of illegality in the plaintiff's filing or pursuit of a labor injunction.

determination of frivolousness when a complaint is at issue.").[10]

The NLRB similarly overstates the conflict between the *Professional Real Estate* standard and the tort of abuse of process. (NLRB Br. at 32-33). As that tort is described in Prosser and Keeton on Torts § 121 (5th Ed. 1984): "[T]here is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions....There is in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort." Again, there is no conflict between these common law principles and the "objective basis" standard for filing a complaint set forth in *Professional Real Estate Investors.*[11]

Of course, it is completely unnecessary for the Court to address the fine points of tort law or any other claimed litigation sanction other than the NLRA and the antitrust laws. BE&K is not asking the Court to apply the First Amendment to any law except those to which the Court *has already applied it.* It is undisputed that the Court has applied the First Amendment to both the antitrust laws and the NLRA so as to protect lawsuits from being declared unlawful under either statute where such lawsuits are supported by probable cause and/or an objective basis. No broader holding is

[10] *See also Professional Real Estate, supra*, 508 U.S. at 65, citing Rule 11 as being consistent with the Court's standard.

[11] Similarly, there is no conflict between the *Professional Real Estate* standard and the inherent power of the courts to assess attorneys fees for bad faith actions during the course of litigation. *Chamber v. NASCO, Inc.*, 501 U.S. 32, 44-46 (1991).

required here to establish that the NLRB Order in this case violates the First Amendment and cannot be enforced.[12]

Finally, the NLRB's claim that the NLRA will be "compromised" by allowing employers to file objectively based suits against employees or unions (NLRB Br. at 45), is belied by the Board's own longstanding interpretation of the Act prior to *Bill Johnson's*. For two decades after the Board's decision in *Clyde Taylor Co.*, 127 NLRB 103, 109 (1960), the Board declined to prosecute any reasonable employer litigation due to the same First Amendment concerns now being raised by BE&K. The NLRB has identified no discernible impact from its former policy on employee/union activities during that period. Since *Bill Johnson's*, however, employer rights have been chilled by the Board's failure properly to protect meritorious litigation from sanction under the NLRA, as the amicus briefs from a broad cross-section of the business community attest. By clarifying the First Amendment standard now and reaffirming that objectively based litigation is protected under the NLRA and the Constitution, the Court will restore a workable balance between the rights of employers, unions, and employees.

[12] Neither the NLRB nor the Unions have contested BE&K's assertions that the underlying litigation in this case was supported by probable cause and was not objectively baseless. Contrary to the Board (NLRB Br. at 40), no remand is required in order to hold that BE&K's conduct was lawful under the NLRA and that the NLRB's Order is not entitled to enforcement. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766-67, n.6 (1969)..

CONCLUSION

For the reasons set forth above and in BE&K's Brief, the Court of Appeals should be reversed and the NLRB's Order should be denied enforcement.

Respectfully submitted,

Maurice Baskin
Counsel of Record for Petitioner
Venable, LLP
1201 New York Ave., N.W.,
Suite 1000
Washington, D.C. 20005
202-962-4800

April 5, 2002

(7)

No. 01-518

Supreme Court, U.S.
FILED
FEB 19 2002
FEB 19 2002
CLERK

IN THE

Supreme Court of the United States

BE&K CONSTRUCTION CO.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND ASSOCIATED BUILDERS AND CONTRACTORS, INC. AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

Of Counsel:
STEPHEN A. BOKAT
ROBIN S. CONRAD
JOSHUA A. ULMAN
NATIONAL CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

STANLEY R. STRAUSS *
DAVID S. FORTNEY
YOORA KIM
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
2400 N Street, N.W.
Washington, D.C. 20037
(202) 887-0855

Attorneys for the Chamber of Commerce of the United States and Associated Builders & Contractors, Inc.

* Counsel of Record

February 19, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

23pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF THE CASE	3
SUMMARY OF THE ARGUMENT	5
ARGUMENT	6
I. THE COURT'S JURISPRUDENCE, OF WHICH BOTH BILL JOHNSON'S AND PROFESSIONAL REAL ESTATE INVESTORS ARE SIGNIFICANT PARTS, FIRMLY ESTABLISHES THE RIGHT TO PETITION FOR JUDICIAL RELIEF	6
II. THE DECISIONS BELOW CONSTRUED BILL JOHNSON'S IN ISOLATION AND THEREBY MISTAKENLY FAILED TO FOLLOW THE CLEAR DICTATE OF PROFESSIONAL REAL ESTATE INVESTORS	10
III. THE DECISIONS BELOW DEPRIVE EMPLOYERS INVOLVED IN LABOR DISPUTES OF THE RIGHT OF PETITION AVAILABLE TO UNIONS AND OTHER LITIGANTS AND THEREBY UNDERMINE IMPORTANT NATIONAL AND STATE INTERESTS	14
CONCLUSION	18

TABLE OF AUTHORITIES

CASES

	Page
American Ship Building Co. v. NLRB, 380 U.S. 300 (1965)	17
BE&K Construction Company v. NLRB, 246 F.3d 619 (6th Cir. 2001)	5, 11, 12
BE&K Construction Company, et al., 329 NLRB 717 (1999)	4, 10, 11
Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983)	*passim*
Bill Johnson's Restaurants, Inc. v. NLRB, 660 F.2d 1335 (9th Cir. 1981)	9
Bill Johnson's Restaurants, Inc., 249 NLRB 155 (1980)	9
California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972)	8
Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978)	8, 13, 14
Cross Pointe Paper Corp., 330 NLRB No. 101 (2000)	13
Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)	7
Esco Corp. v. Unites States, 340 F.2d 1000 (9th Cir. 1965)	15
H.A. Artist & Associates, Inc. v. Actors' Equity Association, 451 U.S. 704 (1981)	15
Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)	15
Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53 (1966)	17
Local Union No. 189, Amalgamated Meat Cutters and Butcher Workmen v. Jewel Tea Co., 381 U.S. 676 (1965)	15
Midland Nat'l Life Ins. Co., 263 NLRB 127 (1982)	13

TABLE OF AUTHORITIES—Continued

	Page
NLRB v. Brown, 380 U.S. 278 (1965)	17
NLRB v. Vanguard Tours, Inc., 981 F.2d 62 (2d Cir. 1992)	12
Northern Pacific Railway Co. v. United States, 356 U.S. 1 (1958)	15
Petrochem Insulation, Inc. v. NLRB, 240 F.3d 26 (D.C. Cir.), *cert. denied*, 151 L.Ed.2d 376 (2001)	12
Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49 (1993)	*passim*
Thomas v. Collins, 323 U.S. 516 (1945)	7
United Mine Workers v. Pennington, 381 U.S. 657 (1965)	8
United States v. Topco Associates, Inc., 405 U.S. 596 (1972)	14
USS-POSCO Indus. V. Contra Costa County Bldg. & Constr. Trades Council, 31 F.3d 800 (9th Cir. 1994)	4, 14, 16
White v. Lee, 227 F.3d 1214 (9th Cir. 2000)	12

STATUTES

Clayton Act, 15 U.S.C. §§ 18 *et seq.*	7
Labor-Management Relations Act of 1947, §303, 29 U.S.C. 187	14
National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*	*passim*
Norris-LaGuardia Act, 29 U.S.C. §§ 101 *et seq.*	7
Sherman Antitrust Act, 15 U.S.C. §§ 1 *et seq.*	4, 15

OTHER AUTHORITIES

Charles R. Perry, *Union Corporate Campaigns* (Univ. of Penn., Wharton School, Major Industrial Research Unit Studies No. 66, 1987).	16

TABLE OF AUTHORITIES—Continued

	Page
D. J. Durie & M. A. Lamley, *The Antitrust Liability of Labor Unions for Anti-Competitive Litigation*, 80 CAL. L. REV. 757 (1992)	16
Karl A. Groskaufmanis, *Proxy Reform and the Brave New World of Investor Relations: Ten Rules of Thumb for the 1990's, in* ADVANCED SECURITIES LAW WORKSHOP 1993 (PLI Corp. Law & Practice Course Handbook Series No. B4-7037, 1993)	16
N. B. Smith, *"Shall Make No Law Abridging. . .": An Analysis of The Neglected, But Near Absolute, Right of Petition*, 54 U. Cin. L. Rev. 1153 (1986)	6, 7
S. J. Schwab & R. S. Thomas, *Realigning Corporate Governance: Shareholder Activism by Labor Unions*, 96 Mich. L. Rev. 1018 (1998)	16

IN THE

Supreme Court of the United States

No. 01-518

BE&K CONSTRUCTION CO.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND ASSOCIATED BUILDERS AND CONTRACTORS, INC. AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

INTEREST OF THE *AMICI CURIAE* [1]

The Chamber of Commerce of the Unites States of America ("the Chamber") is the world's largest federation of business companies and associates, with an underlying membership of nearly 3,000,000 businesses and professional

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no persons other than the *amici curiae*, their members, or counsel, made a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 37.3. Letters of consent are being filed with the Clerk of the Court simultaneously with the filing of this brief.

organizations of every size, in every industry sector, and every region of the country. An important function of the Chamber is to represent the interests of its members by filing briefs *amicus curiae* in cases involving issues of concern to American business. A significant aspect of the Chamber's activities is the representation of the interests of its member-employers in employment and labor relations matters before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance the interests of its members by filing *amicus curiae* briefs in a wide spectrum of labor relations litigation before this Court.

The Associated Builders and Contractors, Inc. ("ABC") is an association of more than 23,000 construction contractors and related firms. Many of ABC's members are "merit shops," that is, they do not regularly operate under collective bargaining agreements with unions. When bidding for contracts in competition with unionized competitors, ABC members have been confronted by activities of labor organizations and their agents with the purpose, or effect, of removing them from competition. They often face, as here, repetitive lawsuits and other tactics which increase their costs or persuade their customers to select other contractors. ABC's members have a fundamental business interest in their business reputations and in seeking judicial determination of their rights. ABC actively represents the interests of its member-employers in a wide variety of labor and employment matters before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government.

Courts are the approved forum for resolving conflicting interests and resulting disagreements; and the First Amendment to the Constitution protects the right to petition the courts. This case presents the issue whether petitions by employers to courts for redress against union and employee

conduct is entitled to a lesser level of constitutional protection than that accorded non-union parties, employees, and other persons. The issue is of vital concern to both the Chamber and ABC, and to their respective constituent employers, many of whom petition courts for relief against union or employee conduct that is arguably unlawful, or is legally unprotected. *Amici* assert therefore that to deny First Amendment protections to employers who may have unsuccessfully, but not unreasonably, petitioned courts for such redress not only chills employers' right of access to courts, but also disrupts the balance which Congress has established under the National Labor Relations Act ("NLRA" or "the Act") among employers, unions, and employees.

In sum, because the Chamber and ABC believe that the same constitutional standard should be applied to employer litigants under the NLRA as is applied to other entities in other legal contexts, they submit this brief *amici curiae* to urge that the Court reverse the decision below and make clear that the objective standard articulated in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), applies to employers who may file losing, but not baseless, lawsuits.

SUMMARY OF THE CASE

United States Steel and a Korean company established a joint venture that contracted with BE&K and its partner, Eichlay Constructors, Inc., to modernize a steel mill in Pittsburgh, California. Because BE&K was a non-union contractor, a group of local unions undertook a series of actions against BE&K and the steel mill owners. These union activities included the initiation of more than 35 lawsuits in state and federal court. In response, BE&K and the mill owners sued the unions in federal district court asserting, *inter alia*, violations of Section 303 of the Labor Management Relations Act. The district court granted partial summary

judgment against the plaintiffs in the latter suit, and they, in turn, amended their complaint to assert, *inter alia*, Sherman Act violations predicated on allegations that the unions had unlawfully conspired with non-labor entities. Ultimately, the district court, after dismissing all other claims, permitted limited discovery on the conspiracy allegations. Then, because the BE&K plaintiffs could not adduce evidence in support of the conspiracy allegations, they, too, were dismissed by the district court.

On appeal, the Court of Appeals for Ninth Circuit upheld the district court's dismissal action. In so doing, it affirmed the district court's dismissal of the antitrust claims against the unions, but in that respect nonetheless noted that "fifteen of the twenty-nine [state] lawsuits alleged by BE&K as part of the pattern of fillings 'without regard to the merits' have proven successful." *USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council*, 31 F.3d 800, 811 (9th Cir. 1994). Because of the latter finding, the Ninth Circuit concluded that BE&K had not established "the charge that the unions were filing lawsuits and other actions willy-nilly without regard to success." *Id.*

The National Labor Relations Board's ("NLRB" or "the Board") General Counsel then processed an unfair labor practice proceeding against BE&K, alleging that BE&K's federal court suit against the unions violated Section 8(a)(1) of the National Labor Relations Act; this, on the ground that BE&K, by filing a meritless lawsuit against the unions in the district court, had retaliated against the unions and their members in violation of the Act's Section 8(a)(1). After a hearing, the NLRB upheld the complaint against BE&K. *See BE&K Construction Company*, 329 NLRB 717 (1999), reproduced in the Petition For Writ of Certiorari herein ("Pet. App.").

The Court of Appeals for the Sixth Circuit, although recognizing that BE&K's district court lawsuit was not objectively

baseless, ruled that this Court's decision in *Professional Real Estate Investors, Inc.*, 508 U.S. 49 (1993), was not controlling. Instead the Sixth Circuit, relying on this Court's earlier decision in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), concluded that the NLRB's finding against BE&K was correct. *BE&K Construction Company v. NLRB*, 246 F.3d 619 (6th Cir. 2001).

SUMMARY OF THE ARGUMENT

The right to petition the government for the redress of grievances is an ancient right. Its origin can be traced to the *Magna Carta*; documents of this country's original colonies acknowledge the right's existence; the right is embedded in the First Amendment to the Constitution; and it is an essential part of this Court's basic jurisprudence. The Court has given expression to the right by making it clear that persons cannot be restrained from requesting specific actions by the legislative and executive branches of the government; and in *Noerr-Pennington*, it has decreed that, except where the judicial process may be corrupted by, *inter alia*, baseless lawsuits, the people should have free and unlimited access to the courts.

In 1978, in *Christiansburg Garment*, the Court, addressing the petitioning right, defined a baseless lawsuit as one that is "groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case." In 1983, in *Bill Johnson's*, the Court, again interpreting that right, ruled that only where a civil suit brought in a state court is "baseless" may the NLRB enjoin, as an unfair labor practice, the suit's continuation. And most recently, in 1993, in *Professional Real Estate Investors*, the Court set forth a two-part test for determining whether a lawsuit is "baseless" and therefore outside the right of protection.

The decisions below misconstrued *Bill Johnson's*, failed to apply the *Professional Real Estate Investors* test, and

erroneously determined that *Noerr-Pennington* did not apply to failed lawsuits brought by employers in labor relations matters. Those decisions, therefore, truncate employers' petitioning right as set forth in the First Amendment and ignore this Court's comprehensive jurisprudence.

The decisions below also undermine important national and state policies and interests, such as those set forth in the federal antitrust laws and in state laws dealing with property matters and slander and libel. Because the right to petition the courts is otherwise applicable to all but baseless lawsuits, those decisions deny to one group—employers—the very protections that this Court has held essential under the Constitution. Further, the denial of the petitioning right not only hinders the judicial development of rules governing new forms of competition, it also disturbs the labor-management balance set forth by Congress in the NLRA.

ARGUMENT

I. THE COURT'S JURISPRUDENCE, OF WHICH BOTH *BILL JOHNSON'S* AND *PROFESSIONAL REAL ESTATE INVESTORS* ARE SIGNIFICANT PARTS, FIRMLY ESTABLISHES THE RIGHT TO PETITION FOR JUDICIAL RELIEF.

"The right of petitioning is an ancient right." [2] It was recognized in England in events leading to the *Magna Carta* in 1215 and in the Petition of Right of 1628. It was first codified in the *Body of Liberties* adopted by the Assembly of the Massachusetts Bay Colony in 1642, was given classical expression in the Virginia Declaration of Rights, and was made part of the First Amendment to the Constitution of the United States: "Congress shall make no law * * * abridging

[2] N. B. Smith, *"Shall Make No Law Abridging. . .": An Analysis of The Neglected, But Near Absolute, Right of Petition*, 54 U. Cin. L. Rev. 1153, 1153 (1986).

the freedom of speech, or the press, or the right of people peaceably to assemble, or petition the Government for redress of grievances." [3]

The right to petition is an essential part of this Court's basic jurisprudence. In *Thomas v. Collins*, 323 U.S. 516, 530 (1945), the Court recognized that "[i]t was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights * * *." [4]

In 1961, the Court addressed an antitrust challenge to a lobbying and publicity campaign waged, *inter alia*, by Eastern Railroads, an association of railroad presidents and a public relations firm. Because lobbying and speech "raise[d] important constitutional questions," the Court held that Congress did not intend the Sherman Act to prohibit persons from "associating together in an attempt to persuade the legislature or the executive" to foster a restraint of trade. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136-138 (1961). The Court stated that the "right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Id.* at 138. The Court warned, however, in *Noerr* that the petitioning right did not extend to "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor * * *." *Id.* at 144.

[3] *See generally*, N.B. Smith, *supra* note 2, at 1153-1175.

[4] The Court also declared in *Collins* that the "[c]hoice on that border" where "the individual's freedom ends and the State's power begins" is always delicate, "perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." 323 U.S. at 530.

Four years later, in 1965, the Court extended the *Noerr* protection, *supra*, to lobbying efforts designed to influence executive officials performing commercial and political duties. *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965). Then in 1972, in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), the Court extended the Right to Petition recognized in *Pennington* to litigation, saying: "The right of access to the courts is indeed but one aspect of the right of petition." 404 U.S. at 510. But the right to judicial access, the Court explained, did not extend to "illegal and reprehensible practice[s] which may corrupt the . . . judicial process[]," 404 U.S. at 513, or to actions intended to deter the "'free and unlimited' access to the . . . courts." 404 U.S. at 515.

The Court, in 1978, next addressed the petitioning right in the context of Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k)—a provision that, *inter alia*, allows the "prevailing party" to recover "reasonable attorney's fees." Affirming the decisions below, which had denied such fees to a successful defendant, the Court said that an automatic granting of attorney's fees to a prevailing defendant would chill suits to vindicate rights created by Title VII. It followed, the Court said, that attorney's fees should be allowed to prevailing defendants only when a suit was "meritless," that is, "groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case . . . ." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978).

Three years later, in 1983, the Court interpreted the right to petition the court as limiting the NLRB's ability to enjoin an ongoing employer lawsuit brought against its employees. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983). After a waitress filed an unfair labor practice charge with the NLRB alleging that she had been fired for engaging in an activity protected by the NLRA, and because she had, with co-workers, picketed and handbilled the restaurant, the restaurant sued in state court, alleging that the picketers had

harassed customers, blocked access, threatened public safety, and libeled the restaurant. While the restaurant's suit was still pending, the NLRB found that its suit was without basis in law or fact, and had been instituted against the employees' protected concerted activity, and, therefore, violated Section 8(a)(1) of the Act. On this basis, the Board ordered the restaurant to withdraw its state court complaint, *Bill Johnson's Restaurants, Inc.*, 249 NLRB 155 (1980), and the Court of Appeals affirmed. *Bill Johnson's Restaurants, Inc. v. NLRB*, 660 F.2d 1335 (9th Cir. 1981). Addressing the single question whether the NLRB may issue a cease-and-desist order to halt the prosecution of a state-court civil suit brought by an employer to retaliate against employees for exercising federally protected labor rights, this Court held that the NLRB could not preempt a state court and substitute its credibility determinations for the state court's, and that the NLRB could enjoin a state court lawsuit as an unfair labor practice only if the state court suit were "baseless."

Finally, in 1993, the Court held that an objective test must be used to determine whether a lawsuit was baseless, and thus not entitled to the petitioning right. To so determine, the Court established a two-part test: "First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits," and then "[o]nly if [the] challenged litigation is objectively meritless, may a court examine the litigant's subjective motivation." *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60-61 (1993).

In sum, over a period of 40 years the Court has developed a comprehensive jurisprudence that protects the fundamental right to petition courts for redress. In interpreting statutes, the Court has presumed that Congress did not intend to violate this fundamental right, and it has also recognized the potential danger of corrupting or blocking the system through the filing of baseless lawsuits. In the latter connection, it has

established the "sham" exception which provides that only a limited class of baseless lawsuits are not entitled to the protection of the petitioning right, that class being defined narrowly as suits without basis in law or fact. Further, the Court's jurisprudence in this respect has been applied in cases arising under the antitrust laws, Title VII, and the NLRA.

II. THE DECISIONS BELOW CONSTRUED *BILL JOHNSON'S* IN ISOLATION AND THEREBY MISTAKENLY FAILED TO FOLLOW THE CLEAR DICTATE OF *PROFESSIONAL REAL ESTATE INVESTORS.*

This case addresses a question not decided in *Bill Johnson's*, namely, after adverse disposition of an employer lawsuit on the merits, to what degree does the First Amendment shield that failed exercise of the right to petition? The clear, but erroneous, answer given to the question by the Board and the court below is none whatsoever.

The decisions below, relying for the most part on *Bill Johnson's*, would limit *Noerr-Pennington* to antitrust claims and would deny First Amendment protection to failed lawsuits brought by employers in labor relations matters. Here, the Board concluded that BE&K's challenge to the multiple lawsuits brought by the unions failed because BE&K did not show that those lawsuits fell within the "sham" exception to *Noerr-Pennington*. The Board next held that the issue presented should be resolved by considering only *Bill Johnson's* and that *Noerr-Pennington* did not otherwise apply to a failed employer lawsuit. Significantly, too, the Board denigrated the Court's holding in *Professional Real Estate Investors*, saying that "even if an employer had a 'reasonable basis' for bringing the suit, the suit may still be found unlawful . . . [where] the Board finds that it brought the suit out of a desire to retaliate against protected activity. . . . The issue here, therefore, is not whether the Respondent's suit

lacked a reasonable basis, but whether it lacked merit (and, if it lacked merit, whether it was filed with a motive to retailiate against the Unions for engaging in protected conduct)." 329 NLRB 717, 721-722 (Pet. App. 43A-44A). Further, the Board deemed irrelevant BE&K's subjective good faith or the existence of objective good cause for bringing the suit, saying: "The Respondent's mistaken belief that the Unions' actions were unlawful, even assuming that it had a reasonable basis and was held in good faith, is not a defense to a finding that its suit was unlawful if, as we find, the suit lacked merit and was filed with retaliatory motive." 329 NLRB at 727 n.58 (Pet. App. 60A n.62). Thus, in essence, because BE&K had lost its suit, the Board bypassed any claim of constitutional "right" and directly addressed the elements of the unfair labor practice charge.

Affirming the Board, the Sixth Circuit below erroneously followed the Board's reading of *Bill Johnson's* as denying any constitutional protection to a failed lawsuit. It similarly dismissed as inapposite this Court's holding in *Professional Real Estate Investors*, stating that where "the judicial branch of the government had already determined that BE&K's claims against the unions were unmeritorious or dismissed, evidence of a simple retaliatory motive would suffice to adjudge the company guilty of committing an unfair labor practice." 246 F.3d at 628.

The decisions below thus simplistically reduce *Professional Real Estate Investors'* two step analysis, *supra*, to one step by not addressing the constitutional question whether BE&K's lawsuit was "objectively meritless" and by considering only that BE&K's lawsuit had been unsuccessful.

The language in *Bill Johnson's* relating to an underlying case decided adversely to an employer can be read in two different ways. It can be read, as the Board and the Sixth

Circuit read it, as creating a unique exception to the Court's First Amendment jurisprudence—that is, failed employer suits are "meritless," and meritless cases are unprotected insofar as subsequent employee or union claims are made that the suits had a retaliatory purpose; [5] or it can be read as setting forth dicta involving a factual situation in which an administrative law judge had already determined that the employer's suit lacked "a reasonable basis." Even then, this Court's language "may find" or "may conclude" in *Bill Johnson's* would indicate something other than an automatic finding of an unfair labor practice by a losing employer litigant. Moreover, the frequent references in *Bill Johnson's* to the development of the petitioning privilege in antitrust cases suggest not that the Court intended to limit the Right of

[5] The Sixth, District of Columbia, Second and Ninth Circuits join in restricting, post-dismissal, employer petitioning right, but they do not agree either as to the extent of the restriction or the reach of *Noerr-Pennington*. The Second Circuit has expressed its concern with an automatic denial of the petitioning privilege, *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 66 (2d Cir. 1992), and the Sixth Circuit has, in this case, stated that the losing employer lost "*some* of its First Amendment protection." 246 F.3d at 629 (emphasis added). Similarly, the Sixth Circuit has restricted the application of *Professional Real Estate Investors* and *Noerr-Pennington* to antitrust cases, 246 F.3d at 629, but the Ninth Circuit has applied "'the First Amendment rationale of the Noerr-Pennington doctrine' broadly to claims not involving antitrust law," and has realistically acknowledged that "it is the NLRA cases that we treat differently from all others with respect to the Noerr-Pennington 'sham' exception. The reason is simple. The First Amendment rights of employers 'in the context of [the] labor relations setting' are limited to an extent that would rarely, if ever, be tolerated in other contexts." *White v. Lee*, 227 F.3d 1214, 1236 (9th Cir. 2000). The D.C. Circuit acknowledged a possible tension between *Bill Johnson's* and *Professional Real Estate Investors* and stated, hopefully: "Perhaps the Supreme Court will one day create a uniform standard for sham litigation governing both NLRA and non-NLRA cases (or explain why the First Amendment protects erring litigants less in the NLRA context than others). . . ." *Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26, 32 (D.C. Cir.), *cert. denied*, 151 L.Ed.2d 376 (2001).

Petition in NLRA cases, but rather to maintain the protection except for "meritless" lawsuits. The analysis and language in *Bill Johnson's* paralleled that in the *Noerr-Pennington* cases, which addressed antitrust and Title VII matters. The Court made clear in *Bill Johnson's* that it used the antitrust cases by analogy, 444 U.S. at 744, and, further, it gave no indication in *Bill Johnson's* that its reference to the key term "meritless" in the latter case ("not prevailing") had a meaning different from the earlier careful usage in *Christiansburg Garment* ("groundless or without foundation, rather than simply that the plaintiff has lost its case"). Accordingly, *Bill Johnson's* offers no policy reason for according employers in an NLRA context lesser protection than is accorded to litigants in other contexts. Nor did the Court in *Bill Johnson's* set forth any suggestion that the risk of employee intimidation should be given greater weight than is accorded to parties in other contexts, or that the risk of intimidation of employees is less when suits are *pending* against them than when they stand vindicated by dismissal.[6]

In sum, the Court in *Professional Real Estate Investors* referred to *Bill Johnson's* without any indication that the latter was not within the case law development of *Noerr-Pennington*, and it set forth no indication that *Bill Johnson's* represented a different application of the petition-ing right. Thus, eliminating or truncating the petitioning right in the one area of the law concerning labor relations stands as a sharp departure from the otherwise consistent case law development. Finally, nothing in the text or history of the First Amendment or the NLRA supports such a strained

[6] As for the matter of the intimidation of employees, the Board has noted in a different context that employees are "mature individuals who are capable of recognizing . . . propaganda for what it is and discounting it." *Midland Nat'l Life Ins. Co.*, 263 NLRB 127, 132 (1982). *See also Cross Pointe Paper Corp.*, 330 NLRB No. 101 (2000) (reiterating the Board's belief that "employees are capable of recognizing campaign propaganda for what it is and discounting it").

exception to the Right of Petition. And because the outcome of litigation is always uncertain, regardless of the context in which it occurs, no good reasons exist for treating employers, employees, or unions differently from other litigants.

III. THE DECISIONS BELOW DEPRIVE EMPLOYERS INVOLVED IN LABOR DISPUTES OF THE RIGHT OF PETITION AVAILABLE TO UNIONS AND OTHER LITIGANTS AND THEREBY UNDERMINE IMPORTANT NATIONAL AND STATE INTERESTS.

Litigation is risky, especially for plaintiffs who bear the primary burden of proof. *See USS-POSCO Industries v. Contra Costa County Building & Construction Trades Council*, 31 F.3d 800, 811 (9th Cir. 1994). Also, *Christiansburg Garment* makes clear that even a suit's dismissal is not to be equated with the concept of "meritless." 434 U.S. at 421-422. Moreover, the effect of a blanket denial of petitioning protection to employer actions against unions has the effect of undermining national policy and recognized state interests.

In 1947, Congress gave expression to the national policy by prohibiting unions from engaging in certain secondary conduct and by creating a private cause of action for "whoever shall be injured in his business or property" as a result of prohibited secondary action, and by making labor unions liable for damages as a result of actions that also constitute union unfair labor practices. Labor-Management Relations Act of 1947, § 303(b), 29 U.S.C. § 187(b). Congress thereby recognized, albeit indirectly, the importance of employer access to courts for the vindication of statutory claims.

The antitrust laws, and especially the Sherman Act, are the "*Magna Carta*" of free enterprise. As such, they are "as important to the preservation of economic freedom . . . as the Bill of Rights is to the protection of personal freedoms." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610

(1972). *See also Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958).[7] Under such laws, antitrust plaintiffs are private attorneys general vindicating important public rights and are entitled to recover their costs and attorneys' fees. 15 U.S.C. §15. Because of standing limitations and the indirect purchaser doctrine, many antitrust claims against unions can be brought only by persons directly affected thereby, which is often an employer. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). But unless employers are able to pursue such claims without concern about being charged with a resulting unfair labor practice charge if the claim is unsuccessful, public harm could continue unabated; and few employers lacking smoking gun evidence would undertake an already difficult antitrust case at the risk of also paying a union's attorneys' fees.[8]

As for state interests, *Bill Johnson's* recognized that states too have valid interests in protecting the security and property of their citizens, and the Court interpreted the NLRA to accommodate those interests. *See* 461 U.S. at 741-742. These interests include holding unions responsible for damage to property and for slander and libel. Thus, the decisions below, in a misguided attempt to protect unions and employees, have thwarted the vindication of these recognized state interests.

---

[7] The Clayton and Norris-LaGuardia Acts, 15 U.S.C. §§ 18 *et seq.* and 29 U.S.C. §§ 101-115, respectively, create a limited statutory immunity for labor unions, which they lose when they combine with non-labor groups, *H.A. Artist & Associates, Inc. v. Actors' Equity Association*, 451 U.S. 704 (1981), or when they engage in conduct not related to wages, hours or working conditions that directly affects competition in the product market. *Local Union No. 189, Amalgamated Meat Cutters and Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676 (1965).

[8] Unions lose their statutory exemption when they conspire with non-labor groups, but proof of collusion is exactly the kind of proof that is not readily available. *E.g., Esco Corp. v. United States*, 340 F.2d 1000, 1004 (9th Cir. 1965) ("[I]t is well recognized that any conspiracy can ordinarily only be proved by inferences drawn from relevant and competent circumstantial evidence * * *.")

In addition to undermining the public interest in enforcing settled policy, the decisions below thwart the development of the law regarding new union practices. Traditional labor conflict involves handbilling, picketing, elections, and strikes; but strikes and elections are becoming less and less important as unions expand their arsenal of weapons. For example, union opposition to non-union or merit contractors "can take the form of either litigation or intervention in federal, state, or local regulatory and zoning processes." D. J. Durie & M.A. Lamley, *The Antitrust Liability of Labor Unions for Anti-Competitive Litigation*, 80 CAL. L. REV. 757, 759 (1992). In place of typical remedies, "'unions may try lawsuits, proxy contests and other approaches.'" Karl A. Groskaufmanis, *Proxy Reform and the Brave New World of Investor Relations: Ten Rules of Thumb for the 1990's*, *in* ADVANCED SECURITIES LAW WORKSHOP 1993 (PLI Corp. Law & Practice Course Handbook Series No. B4-7037, 1993) (citation omitted). *See also* S. J. Schwab & R. S. Thomas, *Realigning Corporate Governance: Shareholder Activism by Labor Unions*, 96 Mich. L. Rev. 1018 (1998), and Charles R. Perry, *Union Corporate Campaigns* (Univ. of Penn., Wharton School, Major Industrial Research Unit Studies No. 66, 1987). Additionally, union campaigns may involve the target employer's financing entity, customers, suppliers and community; and union litigation has often proved to be a key element, as illustrated by the more than 35 state and federal lawsuits filed by unions and associated entities in the case before this Court. *See USS-POSCO Industries*, 31 F.3d at 811 n. 9.

Each of these tactics raises questions as to its general legality and the legality of its use in specific factual situations; and the approved forum for resolving legality has traditionally been the courts. Accordingly, to limit the employers' right of petition by penalizing failed challenges to legality thwarts the development of the law.

Further, the decisions below have the effect of altering the balance of resources available to labor and employers. *Noerr-Pennington* provides extremely broad protection for litigation, often initiatory, brought by unions and their associates even when it fails. Under the decisions below, however, failed employer suits are, by contrast, subject to serious cost and unfair labor practice penalties. The Board's action here parallels that taken by an earlier Board which denied employers the use of the lockout while protecting unions' right to strike. The Court rejected the Board's action and should do so here. *See American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Brown*, 380 U.S. 278 (1965).

In summary, denying constitutional protection to failed employer suits has a substantial chilling effect and the consequences go far beyond the immediate employer. Forgetting that unions "must assume ordinary responsibilities," *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 63 (1966), the decisions below free unions from specific congressional strictures and ignore important state interests in protecting the property, person and reputation of its citizens, limit the development of the law governing secondary activity, and alter the balance of forces established by Congress.

CONCLUSION

For the foregoing reasons, the Court should state that this case is controlled not by *Bill Johnson's*, but by *Real Estate Professional Investors*. Accordingly, the Court should reverse the judgment of the court below.

Respectfully submitted,

Of Counsel:
STEPHEN A. BOKAT
ROBIN S. CONRAD
JOSHUA A. ULMAN
NATIONAL CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

STANLEY R. STRAUSS *
DAVID S. FORTNEY
YOORA KIM
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
2400 N Street, N.W.
Washington, D.C. 20037
(202) 887-0855

Attorneys for the Chamber of Commerce of the United States and Associated Builders & Contractors, Inc

* Counsel of Record

February 19, 2002

(8)

No. 01-518

Supreme Court, U.S.
FILED
FEB 19 2002
CLERK

IN THE
Supreme Court of the United States

BE&K CONSTRUCTION CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR SOCIETY FOR HUMAN RESOURCE MANAGEMENT AND LPA, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

MARK A. CARTER
HEENAN, ALTHEN & ROLES, LLP
1380 BB&T Square
300 Summers Street
Charleston, WV 25301
(304) 342-8960

DANIEL V. YAGER
MCGUINESS, NORRIS & WILLIAMS
1015 15th Street, NW
Suite 1200
Washington, DC 20005
(202) 789-8600

G. ROGER KING
Counsel of Record
J. TODD KENNARD
JEFFREY D. WINCHESTER
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
41 South High Street
Columbus, OH 43215
(614) 469-3939

Counsel for *Amici Curiae*

---

37 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF *AMICI* INTEREST 1

INTRODUCTION AND SUMMARY 2

ARGUMENT 5

I. THE BOARD AND THE SIXTH CIRCUIT FAILED TO PROPERLY APPLY AND ANALYZE WELL-ESTABLISHED PRECEDENT 5

A. THE DEVELOPMENT OF THE "SHAM" LITIGATION STANDARD PRIOR TO *BILL JOHNSON'S* 5

B. THE SUPREME COURT'S DECISION IN *BILL JOHNSON'S* 9

C. APPLICATION OF THE RULE AFTER *BILL JOHNSON'S* 12

II. THE FIRST AMENDMENT RIGHT TO PETITION REQUIRES THE USE OF AN "OBJECTIVELY BASELESS" STANDARD AS A MINIMUM THRESHOLD BEFORE A VIOLATION CAN BE ESTABLISHED UNDER THE NLRA FOR "SHAM" LITIGATION 13

III. THE LOWER COURT'S DECISION IS NOT ONLY LEGALLY WITHOUT SUPPORT BUT IT ALSO IS NOT GOOD PUBLIC POLICY AND IS INCONSISTENT WITH THE CHECK AND BALANCE SYSTEM PROVIDED FOR BY THE NATIONAL LABOR RELATIONS ACT 19

A. THE CHECKS AND BALANCES OF THE NATIONAL LABOR RELATIONS ACT 20

B. OVERVIEW OF UNION CORPORATE CAMPAIGNS 22

C. THE NLRB'S BE&K STANDARD ENCOURAGES THE ILLEGAL AND UNPROTECTED TACTICS OF A CORPORATE CAMPAIGN 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases

Allentown Mack Sales & Serv. v. NLRB, 522 U.S. 359 (1998) 1
Associated Gen. Contractors, 245 NLRB 328 (1979) 9
BE & K Const. Co., 329 NLRB No. 68 (Sept. 30,1999) 12
Bill Johnson's Rests, Inc. v. NLRB, 461 U.S. 731 (1983) ..... *passim*
Bill Johnson's Rests. Inc., 290 NLRB 29 (1988) 12
Bob Evans Farms v. NLRB, 163 F.3d 1012 (7th Cir. 1998) 1
Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 16,18
Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 17
Clyde Taylor, 127 NLRB 103 (1960) 6,7
Crown Cork & Seal Co., 334 NLRB No. 92 (Jul. 20, 2001) 1
De Jonge v. Oregon, 299 U.S. 353 (1937) 14
Diamond Walnut Growers, Inc. v. NLRB, 53 F.3d 1085 (9th Cir. 1995) 12
E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 14,15,16
Epilepsy Found. of Northeastern Ohio v. NLRB, 268 F.3d 1095 (D.C. Cir. 2001) 13
Fashion-Fair, Inc., 159 NLRB 1435 (1966) 6
Food Lion, Inc. v. United Food & Commercial Workers, 103 F.3d 1007 (D.C. Cir. 1997) 23
Int'l Org. of Masters, Mates & Pilots, 224 NLRB 1626 (1976) 7-9

TABLE OF AUTHORITIES
(continued)

Johnson & Hardin Co. v. NLRB, 49 F.3d 237 (6th Cir. 1995) 15
Lodges 743 & 1746 Int'l Assoc. of Machinists & Aerospace Workers, 534 F.2d 422 (2d Cir. 1975) 8
McDonald v. Smith, 472 U.S. 479 (1985) 13,14
Manistee Town Ctr. v. City of Glendale, 227 F.3d 1090 (9th Cir. 2000) 15
NLRB v. Boston Med. Ctr. Corp., 330 NLRB No. 30 (Nov. 26, 1999) 20,21
NLRB v. Cent. Ill. Pub. Serv. Co., 326 NLRB No. 80 (Aug. 27, 1998) 22
NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477 (1960) 21
NLRB v. Kentucky River Cmty. Care, Inc., 532 U.S. 706 (2001) 1
NLRB v. Webcor Packaging, Inc., 118 F.3d 1115 (6th Cir. 1997) 1
Petrochem Insulation, Inc. v. NLRB, 240 F.3d 26 (D.C. Cir. 2001) 12
Power Sys., Inc., 239 NLRB 445 (1978) 8,9
Power Sys., Inc., 601 F.2d 936 (7th Cir. 1979) 9
Prof'l Real Estate Investors v. Columbia Pictures Indus., Inc., 508 U.S. 49 (1993) 5,14,16,17,18
Television Wis., Inc., 224 NLRB 722 (1976) 7-9
Tex. Foundries, Inc., 101 NLRB 1642 (1952) 6,7
Tradesmen Int'l, Inc. v. NLRB, 332 N.L.R.B. 107 (2000) 29
Tradesmen Int'l, Inc. v. NLRB, 275 F.3d 1137 (D.C. Cir. 2002) 29,30
United Aircraft Corp., 192 NLRB 382 (1971) 7
United Mine Workers v. Ill. State Bar Ass'n, 389 U.S. 217 (1967) 2,13
United States v. Robel, 389 U.S. 258 (1967) 18
W.T. Carter & Brother, 90 NLRB 2020 (1950) 5,6,10

TABLE OF AUTHORITIES
(continued)

White v. Lee, 227 F.3d 1214 (9th Cir. 2000) 12

Statutes

18 U.S.C. §§ 1961-68 27

Legislative History

S. Rep. No. 74-573 (1935) 20
78 Cong. Rec. 4229, 4230 (1934) 21

Miscellaneous

204 Daily Reporter (BNA) A-11 (Oct. 22, 1999) 3
A Petition Clause Analysis of Suits Against The Government: Implications For Rule 11 Sanctions, 106 Harv. L. Rev. 1111 (Mar. 1993) 18
J. Crump, *The Pressure Is On: Organizing Without the NLRB*, 18 Lab. Res. Rev. 33 (1992) 25
T. DiLorenzo, *The Corporate Campaign Against Food Lion: A Study of Media Manipulation*, 17 J. Lab. Res. 359 (Summer 1996) 28
C. Gangemi, Jr. and J. Torres, *The Corporate Campaign at Caterpillar*, 17 J. Lab. Res. 377 (Summer 1996) 28
F. Harper & F. James, *The Law of Torts* (1956) 8
V. Hyman, *Steel Mill Clean, EPA Probe Says*, Money, (Apr. 26, 1995) 28
D. La Botz, *The Troublemaker's Handbook* (A Labor Notes Book 1991) 24

TABLE OF AUTHORITIES
(continued)

J. Manheim, *The Death of A Thousand Cuts: Corporate Campaigns and The Attack on the Corporation* (2001) 22,27
H. Northrup, *Corporate Campaigns: The Perversion of the Regulatory Process*, 23 J. Lab. Res. 345 (Summer 1996) 26,27
H. Northrup and C. Steen, *Union "Corporate Campaigns" As Blackmail The RICO Battle at Bayou Steel*, 22 Harv. J.L. & Pub.Pol. 771 (Summer 1999) 27,28
William Prosser, *Law of Torts* (4th ed. 1971) 8
SEIU, *Contract Campaign Manual* (1988) 25
Union Officials Stress International Scope of Organizing, Bargaining Campaigns, Daily Labor Report (BNA) (Nov. 16, 1992) 23

STATEMENT OF *AMICI* INTEREST[1]

The Society for Human Resource Management ("SHRM") is the largest human resource management association in the world. SHRM provides education and information services, conferences and seminars, government and media representation, online services and publications to more than 165,000 professional and student members throughout the world. LPA, Inc., The Labor Policy Association, is a public policy advocacy organization representing senior human resource executives of over 200 leading employers doing business in the United States. Collectively, LPA members employ over 19 million people worldwide and over 12 percent of the U.S. private sector workforce. LPA's members are employers subject to the National Labor Relations Act ("NLRA"). Certain members of LPA have been victims of corporate campaign tactics, similar to those involved in this case. Because of their interest in the development of the nation's labor laws, LPA and SHRM have participated as amicus curiae on many important labor law issues before this Court, the United States Courts of Appeals and the National Labor Relations Board ("NLRB" or "Board").[2] The instant matter is of interest to SHRM and LPA because both believe that the Board's and the Sixth Circuit's decision is in error because (i) it is an incorrect interpretation and application of the case law; (ii) it is a violation of the First Amendment by placing a serious impediment upon the rights of employers and

---

[1] Counsel for all parties have consented to the filing of this brief, and their consents have been filed with the Clerk of this Court. No counsel for either party had any role in authoring this brief, and no other person other than the named *Amici* and their counsel has made any monetary contribution to the preparation and submission of this brief.

[2] *See, e.g., NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001); *Allentown Mack Sales & Serv. v. NLRB*, 522 U.S. 359 (1998); *NLRB v. Webcor Packaging, Inc.*, 118 F.3d 1115 (6th Cir. 1997), *cert denied*, 522 U.S. 1108 (1998); *Bob Evans Farms v. NLRB*, 163 F.3d 1012 (7th Cir. 1998); *Crown Cork & Seal Co.*, 334 NLRB No. 92 (July 20, 2001).

unions who may be involved in labor disputes to seek judicial redress; and (iii) it creates a significant practical barrier for parties to pursue legitimate litigation options because of the substantial likelihood of being found in violation of the NLRA, and correspondingly being exposed to the imposition of the extraordinary remedy of being required to pay the other party's attorneys fees and costs.

INTRODUCTION AND SUMMARY

The instant matter involves the basic right of access to judicial adjudication and redress of legal rights as guaranteed by the First Amendment. Indeed, this fundamental right to petition to the courts is "intimately connected, both in origin and in purpose, with other First Amendment rights of free speech and free press." *United Mine Workers v. Ill. State Bar Ass'n,* 389 U.S. 217, 222 (1967). This matter addresses the rights of parties that become involved in a labor dispute to initiate litigation against the other party without being found to have violated the NLRA and thereby be subjected to a remedy of paying the attorneys fees and costs of the defendant litigant. The facts of the instant matter involve an extensive "corporate campaign" against BE&K Construction Co. by various labor unions to force the employer to change its decision to construct a power plant with both union and non-union workers. The unions in question filed various administrative and judicial actions against BE&K in an attempt to force it to agree to their demands. The unions also initiated various administrative and regulatory filings, picketing and handbilling activity and lobbying initiatives with various state and local governmental entities. Acts of violence were also committed against BE&K and its joint venture partner for proceeding with the project without a commitment to exclusively utilize labor union workers. In response to these actions, BE&K filed various lawsuits and an NLRB charge against the unions that were involved. The Company's litigation responses were either dismissed by the courts or voluntarily withdrawn; its NLRB charge was found to have

merit. Based upon BE&K's unsuccessful litigation initiatives, the defendant labor unions filed § 8(a)(1) unfair labor practice charges with the NLRB and alleged that such litigation by BE&K was an unlawful retaliatory response against the unions with an objective to interfere with the subject unions' rights under the NLRA. The NLRB found merit in the charge and the Sixth Circuit enforced the Board's Order. The Board, as a remedy in this matter, ordered BE&K to pay—contrary to the American Rule that each party in a lawsuit pay its own legal fees and costs—the unions' attorneys fees and costs in defending against the employer-initiated litigation.[3]

This matter, in addition to involving the important First Amendment right of access to the courts, also involves important public policy questions, particularly given the increased use of "corporate campaign" initiatives by labor organizations against employers.[4] Such "campaigns" can

---

[3] The NLRB has not yet issued an Order stating the amount of fees and costs that BE&K is required to pay to the charging party unions. Representatives of the unions in question, however, have stated that the amount that BE&K will have to reimburse them for their litigation costs and fees will total "hundreds of thousands" and potentially "millions" of dollars. Interest also could be assessed on any such fees. *See* 204 Daily Reporter (BNA) A-11, A-12 (Oct. 22, 1999).

[4] Section III of this Brief discusses corporate campaigns in detail. Briefly stated, such "labor disputes" are broad-based initiatives by unions against employers and have one or more of the following objectives: (i) pressure an employer to recognize a union as the exclusive representative of its employees without the benefit of a secret ballot vote conducted by the NLRB—in many instances the union is, at best, a "minority" union and does not enjoy majority support of the employees in the unit in question; (ii) pressure an employer to agree to union demands in contract negotiations when the union is unable to obtain such objectives at the bargaining table; (iii) pressure third parties not to do business with the target employer (*e.g.*, boycott and similar tactics); (iv) pressure an employer not to do business in a particular industry on a non-union basis; (v) pressure an employer not to do business in a particular geographic area on a non-union basis (the instant situation); or (vi) pressure an employer

inflict considerable economic damage on employers, cause the target business to suffer loss of reputation and standing, and if the Board's and lower court's decision herein is not reversed, cause employers who respond to a "corporate campaign" with litigation initiatives, to face the substantial likelihood of being found in violation of the NLRA with a corresponding remedy of being ordered to pay the attorneys fees and costs incurred by the union in such litigation. It is critical that this Court apply the fundamental principles contained in the NLRA to this matter to maintain the delicate, but essential, balance of rights of employers and labor organizations in resolving labor disputes. Such balance, as this Court is well aware, is an essential element of Federal labor law policy and is critical to prevent unnecessary industrial strife. Equally, it is important to maintain such balance to provide appropriate regulatory and statutory incentives for parties to peacefully resolve labor disputes. If union corporate campaigns are permitted to proceed without the ability of target employers to respond with appropriate litigation initiatives, the delicate "check and balance" system of Federal labor policy will be substantially disrupted and additional industrial conflict will be encouraged.

SHRM and LPA respectfully request this Court to clarify its decision in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), and to provide clear guidelines in this area. Specifically, *Amici* submit that given the substantial precedent in other areas of the law providing protection to parties pursuant to the First Amendment to petition the courts for redress of their grievances, that a test be established that would require the Board to find litigation by parties involved in a labor dispute in violation of the NLRA only if (i) said proceedings were without any legal bases, that is, frivolous, or

---

to pay a certain level of wages and benefits to its employees. In all of the above examples, except perhaps (i), the union(s) in question have no intent or practical likelihood of representing the employees of the target employer.

"objectively baseless" as articulated by this Court in *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 55 (1993) *and* (ii) said proceedings were brought for the improper motive of interfering with specific rights provided for under the NLRA.

ARGUMENT

I. THE BOARD AND THE SIXTH CIRCUIT FAILED TO PROPERLY APPLY AND ANALYZE WELL-ESTABLISHED PRECEDENT

A. THE DEVELOPMENT OF THE "SHAM" LITIGATION STANDARD PRIOR TO *BILL JOHNSON'S*

Precedent related to the question before this Court can be traced back to *W.T. Carter & Brother*, 90 NLRB 2020 (1950). In that case, the employer had obtained an injunction in state court preventing union meetings, and had union organizers arrested for violating the injunction. *Id.* at 2021-22. In a two-to-one decision, the Board recognized the "basic right" of access to the court system, but noted that the right is limited by legal doctrines prohibiting malicious use of judicial proceedings for ulterior, retaliatory motives. *Id.* at 2023-24. Because, the Board held, the employer's motive in seeking the injunction was retaliatory in nature, it violated § 8(a)(1) of the NLRA, regardless of the fact that the employer had prevailed in obtaining the injunction. *Id.* at 2022-24.

In his dissent, Chairman Herzog agreed with the Board's finding that the employer's decision to seek the injunction was motivated by a desire to interfere with its employee's right to organize, but argued that "the traditional right of all to bring . . . contentions to the attention of a judicial forum" should not be deemed an unfair labor practice, regardless of the employer's motive in initiating the litigation. *Id.* at 2029.

The Board soon demonstrated dissatisfaction with the *Carter & Brother* decision. For example, in *Texas Foundries,*

Inc., 101 NLRB 1642 (1952), *enforcement denied*, 211 F.2d 791 (5th Cir. 1954), the Board agreed with the trial examiner's holding that a lawsuit brought by an employer to halt picketing was not an unfair labor practice. Keys to the examiner's holding were his findings that the suit was based upon probable cause *and* that the employer was not motivated by an impermissible purpose. *Id.* at 1689 (holding that "I am not convinced that there exists in this case . . . a sufficient basis for finding that the state court process was invoked maliciously, abusively, and in bad faith not to protect legitimate interests under state law . . . ."). Thus, only two years after holding that the party's motive for bringing a court action determined whether or not the action was an unfair labor practice, the Board changed course, and opined that the only suits that are groundless *and* brought for improper reasons violate the NLRA.

In 1960, the Board made it clear that it was charting a course in diametric opposition to the holding in *Carter & Brother*. In *Clyde Taylor*, 127 NLRB 103 (1960), the employer had (i) threatened to file a libel lawsuit against five former employees who had filed unfair labor practice charges after they were terminated for union organizing activities and (ii) obtained an injunction in state court against fellow workers' peaceful picketing in protest of the terminations. Although the Board opined that the threat of a lawsuit violates the NLRA, it held that the actual filing of a suit could not be an unfair labor practice, regardless of the merits of the suit or the motive in filing it. *Id.* at 109-10.

The *Clyde Taylor* holding that the right to seek judicial redress could not qualify as an unfair labor practice, regardless of the merits or motive of the litigation at issue, enjoyed consistent application by the Board for years afterwards. For example, in *Fashion-Fair, Inc.*, 159 NLRB 1435, 1449 (1966), the Board held that an employer's lawsuit brought in state court to enjoin employees from picketing could not support an unfair labor practice charge, even though the lawsuit had no

basis in state law and even though the Board found the suit to have been motivated by the employer's "desire to harass the picketers in the exercise of their protected concerted activities." *See also United Aircraft Corp.*, 192 NLRB 382, 384 (1971) (noting that "since the [*Clyde*] *Taylor* case, the Board has consistently held that the filing of a civil suit cannot be found to be an unfair labor practice") (listing cases).

The Board's bright-line rule set forth in *Clyde Taylor* was modified a decade and a half later in the case of *Television Wisconsin, Inc.*, 224 NLRB 722 (1976). In that case, the union had filed suit against ten former members who resigned their membership prior to a strike, worked during the strike, and circulated decertification petitions. *Id.* at 779. The suit was based in part upon the union's claim that the defendants had violated the union security clause in the collective bargaining agreement. *See id.*

The Board upheld the Administrative Law Judge's ("ALJ") ruling that the union's lawsuit was an unfair labor practice. *Id.* at 722. But in doing so, the Board differed with the ALJ, and stated that the lawsuit was not an unfair labor practice "because of the Union's subjective intent," but rather it amounted to an unfair labor practice "because of the unlawful objective sought by the Union," namely, the enforcement of an illegal union security clause. *Id.* at 722 n.2.

Only nine days after issuing its opinion in *Television Wisconsin*, the Board again illustrated that it had modified the *Clyde Taylor* test and adopted the two-pronged test followed by the Board in *Texas Foundries*. In *International Organization of Masters, Mates & Pilots* ("IOMMP"), 224 NLRB 1626 (1976), the union brought an unsuccessful in rem action against a ship, seeking lost wages for union members who the IOMMP alleged had been unjustly discharged. *Id.* at 1629-30. In upholding the ALJ's finding that the suit was an unfair labor practice, the Board held that (i) the suit "may not have been [brought] in complete good faith" and (ii) the union

had pursued the lawsuit as part of a "larger objective," namely, forcing the employer to agree to an IOMMP contract. *Id.* at 1626, 1634.

Taken together, *Television Wisconsin* and *IOMMP* stand for the proposition that, in order for an unsuccessful lawsuit to qualify as an unfair labor practice, it must be demonstrated both that the suit lacked a good-faith basis in law *and* that it was brought for an improper ulterior motive, namely, to violate the defendant's NLRA rights.[5]

The Board continued to apply such two-pronged test in *Power Systems, Inc.*, 239 NLRB 445 (1978), *enforcement denied*, 601 F.2d 936 (7th Cir. 1979). In that case, the employer sued a former employee for, inter alia, the employer's costs and fees expended in defending itself against the employee's unfair labor practice charges and OSHA complaints. The employer also sought to enjoin the employee from filing any additional administrative or judicial proceedings against it.[6] *Id.* at 445-47. The employer subsequently voluntarily dismissed its request for injunctive relief. *Id.*

The Board, relying upon, inter alia, *Television Wisconsin* and *IOMMP*, noted that under well-established precedent a

---

[5] *Cf. Lodges 743 & 1746 Int'l Assoc. of Machinists & Aerospace Workers*, 534 F.2d 422, 463-65 & n.85 (2d Cir. 1975) (holding that employer's lawsuit could not qualify as "malicious prosecution" because the employer had prevailed, therefore the Board could find the lawsuit to be an unfair labor practice only if it was shown that the "court's processes" had been used for "collateral purposes not related to the suit in question.") (citing W. Prosser, *Law of Torts* § 121 at 857 (4th ed. 1971) and F. Harper & F. James, *The Law of Torts* § 4.9 at 330-33 (1956)).

[6] The employer's desire for an injunction was likely motivated by the fact that, in addition to the two administrative charges the employee had filed against it, the employee had filed no less than 45 charges against multiple labor organizations and employers in years prior. *See Power Sys., Inc.*, 239 NLRB at 446.

lawsuit (whether filed by a union, employee, or employer) amounts to an unfair labor practice only where it is shown that the suit has "no reasonable basis" in the law and was brought "to penalize the other party for exercising protected rights." *Id.* at 449-50 & n.18. Because the Board found the employer's suit against the employee to have "no reasonable basis" and to have been brought for the purpose of harassing the employee, the Board held that the suit was an unfair labor practice. *Id.*

On appeal, the Seventh Circuit denied enforcement on the ground that the record contained insufficient support for the Board's ruling that the employer had lacked a reasonable basis for filing suit or that the employer had an improper motive for such suit. *Power Sys, Inc.*, 601 F.2d at 939-40. Thus, the state of the law at the time *Bill Johnson's* came before this Court was that federal and state court litigation could amount to an unfair labor practice only if it had no reasonable basis in law and was brought for impermissible ulterior reasons. *See id.*; *see also, e.g., Associated Gen. Contractors*, 245 NLRB 328, 331 (1979) (holding that, where employer's lawsuit against the union had been dismissed, such suit was not an unfair labor practice because it was "filed in good faith to enforce colorable contract rights" and because the evidence "fail[ed] to reveal that [the employer's] object in filing the suit was to engage in reprisal . . . .").

B. THE SUPREME COURT'S DECISION IN *BILL JOHNSON'S*

The facts and procedural posture underlying the *Bill Johnson's* decision are as follows: management employees had, on a number of occasions, threatened picketing employees, promising "to get even with them" and threatening that employees would "get hurt" if they continue to picket. *Bill Johnson's*, 461 U.S. at 733-34. The employer then filed a lawsuit in state court seeking to enjoin the employees from picketing, claiming that the employees had libeled it by distributing leaflets allegedly containing "false and outrageous

statements . . . with the malicious intent to injure" the employer, and bringing state law claims of interference with the employers business. *Id.* at 734. The employees filed an unfair labor charge the following day, claiming that the employer's civil suit had been brought in retaliation for the employees' union activities and because they had previously filed charges under the NLRA. *Id.* at 734-35. The ALJ found that the charges had merit.[7]

On appeal, the Board upheld the ALJ's ruling and adopted it "with minor exceptions." *Id.* at 737. The Ninth Circuit then enforced the Board's Order, holding that "substantial evidence supported both the Board's findings that the employer's 'lawsuit lacked a reasonable basis in fact and that it was filed to penalize [the employees] for engaging in protected activity.'" *Id.*

In its opinion, the Court addressed the narrow question of the standard the Board should apply when a party seeks to enjoin another party from pursuing a lawsuit. *Id.* The Court addressed only the employer's libel suit. The Court first traced the evolution of the law in this area back to *Carter & Brother*, and concluded that "[s]ince 1978, the Board has consistently adhered to the *Power Systems* rule that an employer or union who sues an employee for a retaliatory motive is guilty of a violation of the Act." *Id.* at 739. The Court then noted that "[t]here are weighty countervailing considerations . . . that militate against" allowing the Board to enjoin a lawsuit solely on the basis of the motive behind the suit. The Court noted two main concerns: the "First

---

[7] Prior to the hearing, the state court had rejected the employer's request for a preliminary injunction. Moreover, while the ALJ was considering the employees' unfair labor practice charges, the state court granted the employees' motion for summary judgment and dismissed the business interference claims, but left the employer's libel claim for trial. *Bill Johnson's*, 461 U.S. at 735 & n.2. The state court also simultaneously dismissed the employees' cross claim for abuse of process. *Id.*

Amendment rights to petition the government for redress of grievances" and "the States' compelling interest in the maintenance of domestic peace." *Id.* at 741. Because of these two compelling interests, the Court concluded that the Board may enjoin a lawsuit only upon a determination that (i) the suit lacks a reasonable basis and (ii) the suit was brought for an improper motive. *Id.* at 743.

The Court in *Bill Johnson's*, after finding that the employers litigation was baseless and brought for an improper motive, agreed with the Board that as a remedy the employer could be assessed the union's attorneys fees and costs in defending against such litigation.

The Court in *Bill Johnson's* did not, however, have before it a situation where — as contrasted to the instant matter — the litigation in question had been completed. The Court in dicta, did briefly discuss situations where the non-NLRA litigation had been completed. Contrary to the Board and the Sixth Circuit, the Court, however, did not state that a plaintiff in non-NLRA federal and state court litigation presumptively has engaged in illegal conduct pursuant to the first prong or step of any applicable test because the litigation in question was not successful in all respects. Stated alternatively, the *Bill Johnson's* court did not hold that an unsuccessful lawsuit by definition is "objectively baseless" litigation. Further, the Court in *Bill Johnson's* did not conclude that, if a finding that unsuccessful litigation had been pursued, the only inquiry left for the Board to determine was whether the party bringing the litigation at issue did so with an improper ulterior motive. Accordingly, while *Bill Johnson's* is precedent that is important to review in analyzing the instant matter, it is not dispositive of the issue herein.

C. APPLICATION OF THE RULE AFTER *BILL JOHNSON'S*

Albeit incorrectly, after *Bill Johnson's*, most Board and certain court opinions interpreted the Supreme Court's dicta in

Bill Johnson's as requiring the Board to equate a loss in state court with lack of a reasonable basis for bringing the suit, thereby limiting the Board's inquiry to seeking proof of improper intent, which, circularly, could be adduced, at least in part, by the failure of the party initiating the action to prevail.[8] *See, e.g., Bill Johnson's Rests., Inc.*, 290 NLRB 29, 29-32 (1988) (on remand); *Diamond Walnut Growers, Inc. v. NLRB*, 53 F.3d 1085, 1087-88 (9th Cir. 1995). Other decisions have, however, correctly determined that this interpretation of *Bill Johnson's* is problematic, and flies in the face of the well-established law governing the right of access to courts and the doctrines governing frivolous lawsuits, malicious prosecution, and abuse of process. *See, e.g., Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26, 30-35 (D.C. Cir. 2001) (noting that the *Bill Johnson's* dicta creates an anomaly in the jurisprudence governing frivolous lawsuits and musing that "[p]erhaps the Supreme Court will one day create a uniform standard for sham litigation governing both the NLRA and non-NLRA cases . . . ."); *White v. Lee*, 227 F.3d 1214, 1234-37 (9th Cir. 2000) (discussing the Ninth Circuit's application of the dicta of *Bill Johnson's* and noting that it amounts to an "apparently contradictory position" with the Court's other rulings regarding the right to seek judicial redress of controversies).

A review of the Board precedent in this area as outlined above, and the corresponding circuit court precedent, does not support, as a matter of law, the Board's and lower court's conclusion that BE&K initiated litigation against the unions in question that was "objectively baseless." Indeed, just the opposite conclusion can be drawn as there is substantial

[8] The Board also held that BE&K's voluntary dismissal of certain causes of action could be regarded as the equivalent to a showing that its litigation lacked merit. *BE&K Const. Co.*, 329 NLRB No. 68 (1999). Such a finding, *Amici* submit, is also clear legal error.

precedent to support the legal bases for BE&K's litigation initiatives.[9]

Finally, by granting certiorari in this case, the Court not only has the opportunity to reverse the decision below, but also to clarify its dicta in *Bill Johnson's*, and to establish a uniform standard governing the pursuit of frivolous or "sham" litigation that is true to the Court's jurisprudence in other areas.

II. THE FIRST AMENDMENT RIGHT TO PETITION REQUIRES THE USE OF AN "OBJECTIVELY BASELESS" STANDARD AS A MINIMUM THRESHOLD BEFORE A VIOLATION CAN BE ESTABLISHED UNDER THE NLRA FOR "SHAM" LITIGATION

In the instant matter, the lower court's standard for evaluating "meritless" litigation violates fundamental principles related to citizens' right to petition the government. That right is "among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers*, 389 U.S. at 222 (1967).

The right to petition is "implicit in the very idea of government, republican in form." *McDonald v. Smith*, 472 U.S. 479, 482 (1985) (quotation and bracket omitted). Indeed, "[t]he Petition Clause . . . was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble." *Id.* at 485. "[T]he values in the right

[9] Under any scenario, BE&K should not be found guilty of an unfair labor practice in this matter, since it is clear from reviewing the Board's decision that new "law" has been developed by the Board in this case. Accordingly, if the decision below is not reversed, the Board's new approach to this area of the law should only be applied prospectively. *See Epilepsy Found. of Northeast Ohio v. NLRB*, 268 F.3d 1095, 1102-03 (D.C. Cir. 2001) (holding that the Board's new position on the application of *Weingarten* rights to non-union employees should be applied only prospectively).

of petition as an important aspect of self-government are beyond question." *Id.* at 482.

Consistent with the central role that the right to petition plays in a representative democracy, the right should not be abridged through governmental action "except in the most extreme circumstances 'without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions.'" *McDonald*, 472 U.S. at 486 (Brennan, J. concurring) (quoting *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937)). A long line of right to petition jurisprudence supports this premise.

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, the Court rejected an interpretation of the Sherman Act that would have allowed liability based on petitioning the government. *See* 365 U.S. 127, 137-39 (1961). As the Court explained, "we cannot, of course, lightly impute to Congress an intent to invade" the freedoms protected by the Bill of Rights, including the right of petition. *See id. at 138.*

The only exception to immunity for petitioning that the Court has identified is outlined in its decision in *Noerr-Pennington*. Such exception is for "mere sham" activities. *See id.* at 144. In particular, the Court found that the application of the statute—and thus the removal of First Amendment immunity—"would be justified" when petitioning "ostensibly directed toward influencing governmental action, *is a mere sham* to cover . . . an attempt to interfere directly with the business relationships of a competitor." *Id.* at 144 (emphasis added).

While the *Noerr-Pennington* doctrine initially arose in an antitrust context, its rationale applies in many other contexts, as this Court has previously noted. *See Prof'l Real Estate Investors v. Columbia Pictures Indus., Inc.*, 508 U.S. at 58-59 (stating that [w]hether applying *Noerr* as an antitrust doctrine *or invoking it in other contexts* . . ." and equating "sham" litigation in the antitrust context and "baseless" litigation in

the labor context) (emphasis added); *see also, e.g., Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1092 (9th Cir. 2000) (concluding that "[t]he immunity is no longer limited to the antitrust context"). These, and other cases have recognized, there is no logical reason to limit the *Noerr-Pennington* doctrine to antitrust cases. Indeed, there is no reason that a claim under the NLRA should be allowed to abridge or chill the First Amendment right to petition to a greater extent than in the antitrust context.

The *Bill Johnson's* case was another application of the *Noerr-Pennington* principle and reinforced that the same First Amendment right of access to courts should inform the Court's construction of the Act. *See* 461 U.S. at 741-43. The only issue that the Court considered in *Bill Johnson's* was "whether the Board may issue a cease-and-desist order to halt the prosecution of a state court civil suit brought by an employer to retaliate against employees for exercising federally-protected labor rights, without also finding that the suit lacks a reasonable basis in fact or law." *See id.* at 733. The Court concluded that "the Board may not halt the prosecution of a state-court lawsuit, regardless of the plaintiff's motive, *unless the suit lacks a reasonable basis in fact or law.*" *Id.* at 748 (emphasis added). The Court was not asked to consider what standard should be applied after the conclusion of the litigation to determine whether the employer's lawsuit was a "sham" and could therefore subject the employer to liability consistent with the First Amendment's right to petition.

The Court identified two different interests that courts have to consider in determining whether filing a lawsuit could violate § 8(a)(1) of the NLRA. The first was the right to petition, and the second involved interests arising from the "States' compelling interest in the maintenance of domestic peace." *See* 461 U.S. at 741-44; *see also Johnson & Hardin Co*, 49 F.3d at 242 (stating that the Court in *Bill Johnson's* "referred explicitly to the First Amendment right to petition the government for redress of grievances and the States'

compelling interest in maintaining domestic peace by providing a forum to its citizens for the redress of wrongs") (citing *Bill Johnson's*, 461 U.S. at 741-42).

In *Professional Real Estate Investors*, the Court clarified the standard for ensuring First Amendment rights in this context. The Court explained that "[o]ur decisions therefore establish that *the legality of objectively reasonable petitioning* 'directed toward obtaining governmental action' is 'not at all affected by any anti-competitive purpose [the actor] may have had.'" *Prof'l Real Estate Investors*, 508 U.S. at 59 (quoting *Noerr*, 365 U.S. at 140). As the Court explained:

> Since *California Motor Transport*, we have consistently assumed that the sham exception contains an indispensable objective component . . . . Whether applying *Noerr* as an antitrust doctrine or invoking it in other contexts, we have repeatedly reaffirmed that evidence of anti-competitive intent or purpose alone cannot transform otherwise legitimate activity into a sham. Indeed, by analogy to *Noerr's* sham exception, we held that even an "improperly motivated" lawsuit may not be enjoined under the National Labor Relations Act as an unfair labor practice unless such litigation is "baseless."

508 U.S. at 58-59 (internal citations omitted). Thus, since *Professional Real Estate Investors*, it has been this Court's guidance to the circuits—with no distinction between "injunction" cases and those resolved on the "merits"—that the First Amendment protects a plaintiff from liability unless the lawsuit is "objectively baseless."

The Court in *Professional Real Estate Investors* also issued an admonition to the lower courts. Such admonition foreshadowed the circumstances present here:

> [W]hen the antitrust defendant has lost the underlying litigation, a court must "resist the understandable temptation to engage in post hoc reasoning by concluding"

> that an ultimately unsuccessful "action must have been unreasonable or without foundation." The court must remember that "[e]ven when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit."

508 U.S. at 61, n.5 (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978)); *see also Prof'l Real Estate Investors*, 508 U.S. at 60 (concluding that antitrust and labor issues could override right to petition only when a lawsuit is "objectively baseless" such that "no reasonable litigant could realistically expect success on the merits"). Taken together, these cases mandate that "unmeritorious" or "sham" should not be construed so narrowly as to mean that any time an employer does not prevail as a plaintiff it can be held liable under the NLRA because there is a right to petition interest that must be considered, *even after* the close of unsuccessful litigation.

As explained above, *Bill Johnson's* did not address the First Amendment implications of liability for an unsuccessful plaintiff once the litigation has run its course, much less the case of a plaintiff who filed its action in good faith but simply lost on the merits, no matter how "close" the result. Thus, the language on which the lower court relied in this case is dicta. Further, the lower court's decision does not address the First Amendment issue in the post-litigation situation, other than to, in effect, assume that there is *no* such interest once litigation has been completed. That is contrary to this Court's guidance in *Bill Johnson's*, as made clear in *Professional Real Estate Investors*.

Finally, the court of appeals' standard does not consider the possibility of any less restrictive means of controlling frivolous lawsuits. If a plaintiff brings a baseless lawsuit, an aggrieved party has several remedies that do not directly impinge on First Amendment rights, including claims for abuse of process and sanctions under Rule 11. *See generally*

United States v. Robel, 389 U.S. 258, 268 (1967) (stating that a statute that "imposes a substantial burden on protected First Amendment activities" must meet its goals "by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms"); *A Petition Clause Analysis of Suits Against The Government: Implications For Rule 11 Sanctions*, 106 Harv. L. Rev. 1111, 1122 (Mar. 1993) ("when courts apply Rule 11 sanctions to complaints, courts punish citizens' presentation of judicial petitions.")

The practical effect of the Board's and lower court's standard would be to hold that any time an employer's lawsuit against labor organizations is unsuccessful—including voluntarily dismissed—there is a substantial likelihood that the Board will find a violation of the NLRA irrespective of the employer's good faith in filing suit and irrespective of the "merit" of the action. That rule completely disregards the Court's prior rulings that the First Amendment and the right to petition protect all but "sham" litigation, as set forth in *Professional Real Estate Investors* and *California Motor Transport*. Indeed, under the court of appeals' rule, the only way to avoid an unfair labor practice finding is to either not initiate litigation in the first instance, no matter how valid the claim appears to be at the outset, or pursue litigation in a very aggressive posture and obtain a "victory" in all areas. Certainly, voluntary dismissal, or perhaps even settlement would, pursuant to the Board's BE&K standard, not be safe harbors for an employer litigant. Under this approach the General Counsel of the Board would not need to introduce any evidence that the lawsuit was subjectively or objectively baseless or that the employer acted for retaliatory reasons in filing the action.

Instead, those elements are essentially presumed, in what is apparently an irrebuttable presumption test. Such "irrebuttable" presumption test amounts to an emasculation of the First Amendment right to petition for redress for parties that are involved in a labor dispute.

Faced with the choice of having to prevail or risking the possibility of losing, being found, ipso facto, of having committed an unfair labor practice and being forced to pay the union's attorneys fees, no doubt many, if not most, employers will be forced to forego exercising their right to petition. If BE&K's action was unlawful, even though it was filed and maintained with experienced counsel and in defense of plainly improper non-employee conduct, then every time an employer files a lawsuit against a labor organization, the employer is facing a potential unfair labor practice, even for non-"sham" litigation. The court of appeals' decision will chill businesses' right of access to the courts because of the extreme—if not unavoidable—risk of being conclusively presumed to have committed unfair labor practices.

BE&K, and other employers faced with like circumstances, have the right to expect the same First Amendment protection to petition the courts for redress as litigants do in other areas of the law without the imposition of findings of unlawful activity and potential harsh remedies. Such parties should also have the same right to rely upon precedent in evaluating litigation options as parties do in other areas of the law. Indeed, after reviewing the substantial precedent in support of the Petitioner's position in the instant matter, *Amici* respectfully submit that the instant matter is not even a "close" case and that the Board, not BE&K, has come perilously close to being the party that should be required to reimburse attorneys fees and costs.

III. THE LOWER COURT'S DECISION IS NOT ONLY LEGALLY WITHOUT SUPPORT BUT IT ALSO IS NOT GOOD PUBLIC POLICY AND IS INCONSISTENT WITH THE CHECK AND BALANCE SYSTEM PROVIDED FOR BY THE NATIONAL LABOR RELATIONS ACT

The decision of the NLRB in the instant matter has sanctioned an employer for responding to arguably

unprotected tactics and legally questionable actions developed by unions as part of the "corporate campaign." Because the NLRB has failed to confront this relatively new tactic of "economic warfare"[10] being utilized by organized labor, it is necessary to outline the process to provide context for this Court in addressing the substantive legal issues presented by the Petitioner which are outlined in Sections I and II, *infra*. Specifically, the decision below is not consistent with the letter or spirit of the NLRA because it punishes employers who resist illegal and unprotected corporate campaign tactics by seeking recourse to the civil courts.

A. THE CHECKS AND BALANCES OF THE NATIONAL LABOR RELATIONS ACT

The NLRA is founded upon a model which anticipates the potential for adversarial relationships. The Act anticipates that the relationships between labor unions and employers can become contentious, but seeks to resolve those disputes through non-confrontational means. In short, "[t]he primary purpose of the Act is to minimize industrial conflict by channeling it into an adversarial arms-length bargaining system." S. Rep. No.74-573 (1935).

Accordingly, Congress, in constructing the Act, fully anticipated that the nation's unions and management would occasionally resort to "economic warfare," but sought to mitigate the ferocity of the conflict through the statute. The underlying legislation to the Act was drafted to address "sharp outbreaks of economic warfare." 78 Cong. Rec. 4229, 4230 (1934).

Indeed, this Court has acknowledged that the effective operation of the NLRA will include the sporadic resort to economic weapons and economic warfare by the parties.

---

[10] *NLRB v. Boston Med. Ctr. Corp.*, 330 NLRB No. 30 (Nov. 26, 1999) (Member Brame, dissenting).

> It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for the truth—or even with what might be thought to be the ideal of one. The parties —even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. . . . The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.

NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 488-489 (1960).

Members of the NLRB have recognized that the traditional tools of labor and management are anticipated in the process of the NLRA. For example, strikes and lockouts have been found to be legitimate checks and balances in the operation of the statute. "[W]hen efforts to bargain break down, as they inevitably will in some cases, the Act contemplates that the parties will resort to "economic warfare," including strikes and lockouts to resolve their differences. . . . Striking employees withhold their labor for the purpose of pressuring an employer to accede to their demands. . . ." *NLRB v. Boston Med. Ctr. Corp.*, 330 NLRB No. 30 (Nov. 26, 1999) (Member Brame, dissenting) (footnote omitted), *see also*, *NLRB v. Cent. Ill. Pub. Serv. Co.*, 326 NLRB 928 (1998) (conversely, an employer is free to operate its business, with or without replacement employees, and in certain circumstances may lockout striking employees).

Organized labor has expanded the arsenal of weapons it engages in economic warfare, and the weapon at issue here—the corporate campaign—is one which the NLRA does not prescribe a check or counter-balance. The absence of a remedy under the NLRA for illegal and unprotected corporate

campaign activity naturally leads employers to the civil courts. However, under the current rule as interpreted by the NLRB below, employers are confronted with severe sanctions if they seek recourse in the civil courts, necessarily tilting the desired "level playing field" in labor relations considerably in favor of organized labor.

B. OVERVIEW OF UNION CORPORATE CAMPAIGNS

A corporate campaign is a coordinated attack by a union using a variety of economic, legal, political, and psychological weapons against a corporation that has opposed unionization, refused to agree to the union's bargaining demands, or in some other way refused to yield on some issue of great importance to the labor organization waging the campaign. The attack is waged in numerous forums. including regulatory agencies and the courts. The attack is intended to tarnish the image, and undermine the reputation, of the targeted company through constant and unyielding pressure and to cause so much disruption that management is forced to surrender to the union's demands.[11] But most of all, it is warfare which unions have chosen to undertake outside the confines of the representational procedures of the Act.

Courts are beginning to acknowledge the destructive nature of these attacks. The Court of Appeals for the District of Columbia Circuit defined corporate campaigns as:

> a wide and indefinite range of legal and potentially illegal tactics used by unions to exert pressure on an employer. These tactics may include, but are not limited to, litigation, political appeals, requests that regulatory agencies investigate and pursue employer violations of state or federal law, and negative publicity campaigns aimed at

---

[11] *See generally*, J. Manheim, *The Death of A Thousand Cuts: Corporate Campaigns and The Attack on the Corporation*, p. xiii (2001).

> reducing the employer's goodwill with employees, investors, or the general public.

Food Lion, Inc. v. United Food & Commercial Workers, 103 F.3d 1007, 1014 n.9 (D.C. Cir. 1997). However, long before this, unions themselves have described the strategy more succinctly:

> [C]orporate campaigns . . . swarm[] the target employer from every angle, great and small, so that corporate officers are always aware of the effects of their decreases on the rank and file. It's the death of a thousand cuts rather than a single blow.

Union Officials Stress International Scope of Organizing, Bargaining Campaigns, Daily Lab. Rep. (BNA) [at A-5 Nov. 16, 1992) (quotation and citation omitted).

The AFL-CIO Industrial Union Department ("IUD") defines a corporate campaign as one which:

> Applies pressure to many points of [corporate] vulnerability to convince the company to deal fairly and equitably [from the union's point of view] with the union. . . . It means vulnerabilities in all of the company's political and economic relationship—with other unions, shareholders, customers, creditors, and government agencies—to achieve union goals.

Developing New Tactics: Winning with Corporate Campaigns, Industrial Union Department, AFL-CIO at 1 (1985). And, according to Ray Rogers, who claims to have initiated corporate campaign strategies:

> "[W]e develop a campaign strategy that has a beginning point A and an end point Z. Point Z is total defeat or annihilation of your adversary."

Quoted in, D. La Botz, *The Troublemaker's Handbook* at 128, (A Labor Notes Book 1991). According to *The Troublemaker's Handbook*, such campaigns "are effective

when they inflict costly consequences on the target company or its allies." *Id.* at 127.

Manuals, such as *Developing New Tactics: Winning with Corporate Campaigns* and *The Troublemaker's Handbook*, have been published by several union-affiliated organizations, individual unions, and the AFL-CIO to guide local unions in waging corporate campaigns. These manuals explain the rationale behind corporate campaigns and provide tactical suggestions and organizational templates. It is clear from the manuals that unions view federal and state law as a means to harass employers:

> Both public institutions and private companies are subject to all sorts of laws and regulations, from the Securities and Exchange Commission to the Occupational Safety and Health Act, from the Civil Rights Act to the local fire codes. Every law or regulation is a potential net in which management can be snared and entangled.

A Troublemaker's Handbook, *supra* at 127.

Part of ensnaring management is using regulatory agencies to harass management. The IUD's manual, *Developing New Tactics: Winning with Corporate Campaigns*, *supra*, phrased it this way:

> Businesses are regulated by a virtual alphabet soup of federal, state, and local agencies, which monitor nearly every aspect of corporate behavior. Although these watchdog agencies employ inspectors to monitor compliance by companies, most rely on employees and other individuals to file complaints about violations. Once the regulators are alerted by a company, they sometimes assume an adversarial relationship toward the offender.

Id. at 6. The Service Employees International Union's ("SEIU") Manual clearly sums up the purpose for which unions utilize regulatory agencies in corporate campaigns:

> Moreover, even if the violations are completely unrelated to bargaining issues, your investigations may give management added incentive to improve its relationship with you. Management officials may find that . . . the employer now is facing . . .
>
> — Extra expense to meet regulatory requirement or qualify for necessary permits and licenses.
>
> — Costly delays in operations while those requirements are met.
>
> — Fines or other penalties for violating legal obligations.
>
> — Damage to the employer's public image, which could jeopardize political or community support, which in turn could mean less business or public funding.

SEIU Contract Campaign Manual, 3-21 (1988).

As these manuals demonstrate, in a typical corporate campaign, unfair labor practice charges are filed with the Board, safety complaints with the Occupational Safety and Health Administration ("OSHA"), charges generated with the Environmental Protection Agency ("EPA"), and protests filed to petitions for local building permits, sometimes by cooperating "public interest" groups. Expensive litigation and bad publicity for corporations frequently result. At the same time, little thought or attention is given to the representational wishes of the employer's employees, *i.e.*, such employees frequently have not requested and may even oppose the union's pressure tactics against their employer.

Thus, in an article entitled *The Pressure is On: Organizing Without the NLRB*, by Joe Crump, Secretary-Treasurer of the United Food and Commercial Workers ("UFCW"), Local 951, the union author provides an extremely candid and graphic discussion of the intent of unions during a corporate campaign. J. Crump, *The Pressure Is On: Organizing Without the NLRB*, 18 Lab. Res. Rev. 33 (1992). In his article, Crump describes

his local's "success" against Family Foods, a supermarket chain, in Kalamazoo, Michigan:

> After a three-year struggle, the battle with Family Foods is over. Do we represent the employee? No. The company went out of business. The good news is that some of the stores were purchased by companies already under a Local 951 contract. A couple of stores are empty, but I am sure that many of the former patrons are now shopping in unionized stores. Perhaps even more important is the message that has been sent to nonunion competitors: There is no "free lunch" in our jurisdiction.

Id. at 35. The local succeeded in putting the company out of business after engaging in a corporate campaign that targeted several demographic groups and using a different approach for each. For example, the UFCW targeted senior citizens by accusing the company of taking excess pension funds.

In another case, in mid-1993, the United Steelworkers ("Steelworkers") announced a corporate campaign against Bayou Steel in LaPlace, Louisiana, where a strike of several months had been in progress, but the company continued to operate. For three difficult years— from August, 1993 through September, 1996—the Steelworkers waged an exhausting corporate campaign against the steel company.[12] As part of its corporate campaign, the Steelworkers filed numerous complaints with the Louisiana Department of Environmental Quality, causing the Louisiana agency to react strongly after numerous unsupported allegations of

---

[12] On October 29, 1997, Bayou Steel and the Steelworkers entered into a confidential settlement agreement ending the company's Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68, ("RICO") lawsuit based on the Steelworkers' corporate campaign. *See* H. Northrup and C. Steen, *Union "Corporate Campaigns" As Blackmail: The RICO Battle at Bayou Steel*, 22 Harv. J.L. & Pub. Pol'y 771, 773 (Summer 1999).

environmental offenses. Its deputy secretary wrote the chairman of the local union safety committee as follows:

> The numerous special inspections in response to your frequent unsupported allegations have not resulted in any findings of significant danger to the environment or human health, nor an emergency, nor the discovery of an abandoned hazardous waste site, nor any findings of significant violations of the Environmental Quality Act. This office can no longer reasonably believe your unsupported allegations against the above referenced facility. Submit significant, verifiable evidence to support your allegations against the above referenced facility, and this office will investigate in an appropriate manner.

H. Northrup, *Corporate Campaigns: The Perversion of the Regulatory Process*, 17 J. Lab. Res. 345, 353-54 (Summer 1996) (hereinafter cited as *The Perversion of the Regulatory Process*) (quoting letter from Filmore F. Bordelson, III, Deputy Secretary, Louisiana, Department of Environmental Quality, to Maurice Simoneaux, Chairman, Safety and Health, United Steelworkers, Local 9121, Nov. 17, 1994). The "significant, verifiable evidence' was never forthcoming. Meanwhile, despite the state inspections, the federal EPA insisted on inspections of its own, thus subjecting this small company to further harassment. After two inspections and numerous information requests over a ten-month period, the EPA confirmed the state agency's findings that there were no major environmental violations at Bayou Steel. *Id.* at 354 (citing, V. Hyman, *Steel Mill Clean, EPA Probe Says*, Money, Apr. 26, 1995, at C-1). These are only a few of the many examples of companies that have been victimized by corporate campaigns waged against them by unions.[13]

---

[13] For further discussion of the corporate campaigns waged against various companies, *see generally*, J. Manheim, *The Death of A Thousand Cuts: Corporate Campaigns and the Attack on the Corporation*, (2001); H.

C. THE NLRB'S BE&K STANDARD ENCOURAGES THE ILLEGAL AND UNPROTECTED TACTICS OF A CORPORATE CAMPAIGN

Employers victimized by illegal and unprotected corporate campaign tactics are unable in a vast majority of situations to seek relief before the NLRB, and are subject to sanction by the NLRB for pursuit of a remedy before the Courts, as evidenced in the instant matter, thereby destroying the parity sought by federal labor law between labor and management.

Unions are not protected by the NLRA when they take actions solely to injure an employer. In *Tradesmen Int'l Inc.*, 332 NLRB No. 107 (Oct. 31, 2000), a union organizer participated in a public hearing before the City of Lorain, Ohio. The organizer testified that Tradesmen should be subject to a city ordinance which required certain contractors to post surety bonds when doing business in the city. The organizer subsequently applied for employment with Tradesmen, a corporate campaign tactic known as "salting," and was not hired. The organizer alleged successfully before the NLRB that the employer had refused to hire him based upon his testimony to the city, and that the conduct was protected activity under the Act as it was engaged in for the mutual aid and protection of employees.

The D. C. Circuit vacated the decision of the NLRB as the conduct of the organizer in publicly criticizing the employer was not for the mutual aid and protection of employees and therefore was not protected by the Act. The Court focused on

---

Northrup, *The Perversion of the Regulatory Process, supra*, (discussing corporate campaigns against various companies including Nordstrom and the International Paper Company); T. DiLorenzo, *The Corporate Campaign Against Food Lion: A Study of Media Manipulation*, 17 J. Lab. Res. 359 (Summer 1996); C. Gangemi, Jr. and J. Torres, *The Corporate Campaign at Caterpillar*, 17 J. Lab. Res. 377 (Summer 1996).

the desired impact of the organizer's conduct in resolving the matter, noting that "[i]n the present case, Oakes's activity was not an effort to improve any employees' (union or non-union) working conditions. So far as the record shows, it was solely an effort to raise Tradesmen's costs." *See Tradesmen Int'l v. NLRB*, 275 F.3d 1137, 1143 (D. C. Cir. 2002).

As noted, unions admit that they design corporate campaign tactics to create unnecessary expenses for employers. *See Contract Campaign Manual*, 3-21 *supra*. Where this is the sole motivation for the union's, or its agent's conduct, the D. C. Circuit concluded accurately that the union loses its § 7 NLRA protections:

> The Board's decision suggests a new standard that any activity that raises a non-union employer's costs "levels the playing field" between union and non-union employers, even if unrelated to working conditions or union/non-union status, and is therefore protected under the Act . . . . But such a standard effectively erases any line between acceptable and unacceptable activity directed toward an employer's economic health. We reject this sweeping and unprecedented expansion of "concerted activity for mutual aid or protection."

Tradesmen Int'l, 275 F.3d at 1143.

The D.C. Circuit in *Tradesmen* was correct in rejecting the "unprecedented expansion of concerted activity for mutual aid or protection" that is implicit in the core definition of corporate campaigns. The instant matter is yet another example of the Board's improper expansion of "mutual aid and protection" concurrent with harsh remedies. *Amici* respectfully request that this Court clearly and decisively reject such expansion by the Board and re-establish the balance of rights of employers and labor organizations under the NLRA.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

MARK A. CARTER
HEENAN, ALTHEN & ROLES, LLP
1380 BB&T Square
300 Summers Street
Charleston, WV 25301
(304) 342-8960

DANIEL V. YAGER
MCGUINESS, NORRIS & WILLIAMS
1015 15th Street, NW
Suite 1200
Washington, DC 20005
(202) 789-8600

G. ROGER KING
Counsel of Record
J. TODD KENNARD
JEFFREY D. WINCHESTER
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
41 South High Street
Columbus, OH 43215
(614) 469-3939

Counsel for *Amici Curiae*